SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 450.

THE UNITED STATES, APPELLANT,

vs.

THE BELLINGHAM BAY BOOM COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit

THE UNITED STATES OF AMERICA,
Complainant,

vs.

THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.

Bill in Equity.

To the Honorable Judges of the Above Court:

The United States of America brings this, its bill of complaint against the Bellingham Bay Boom Company, whereupon your orator complains and alleges:

1. That this suit is brought by and under the direction of the attorney general of the United States.

2. That the defendant, the Bellingham Bay Boom Company, is and during all the time hereinafter mentioned was, a corporation, organized and existing under and by virtue of the laws of the State of Washington.

3. That the Nooksack River is a navigable stream which empties into Puget Sound in Bellingham Bay, at the county of Whatcom, State of Washington, and its waters are navigable from its mouth to a distance of several miles towards its source.

4. That the said defendant for a period of more than one year last past has maintained, and continues to maintain, an obstruction in the navigable waters of said river at and near where it empties into Bellingham Bay, as aforesaid, such obstruction consisting of a boom at which logs floated down said river are moored, the boom being constructed in such manner as to blockade the said river during a large portion of the year, rendering navigation thereon impossible during said time.

5. That the said river is used for navigation by steamboats and small crafts; and that said defendant has not obtained permission of the secretary of war of the United States to continue or to maintain said boom, and the said boom was constructed and is maintained without the permission of the said secretary of war, and is continued in the said navigable waters, aforesaid, without his consent.

Wherefore, your orator prays that a permanent injunction be granted enjoining said defendant from further continuing or maintaining the said obstruction, or any part thereof, and to cause the same to be removed, and for such other and further relief as to the court may seem meet and equitable.

P. H. WINSTON,
United States Attorney.
By P. C. SULLIVAN,
Ass't U. S. Attorney, Solicitors and Counsel for Complainant.

[Endorsed]: No. 163. Bill in Equity. Filed May 2, 1892. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Washington.

IN EQUITY.

Subpœna ad Respondendum.

The President of the United States of America, to the Bellingham Bay Boom Company, a Corporation, Greeting:

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Seattle, on the 6th day of June, A. D. 1892, to answer a bill of complaint exhibited against you in said court by the United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the 116th.

[Seal U. S. Circuit Court, District of Washington.]

A. REEVES AYRES,
Clerk.

By R. M. Hopkins,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

You are hereby required to enter your appearance in the above suit on or before the first Monday of June next at the clerk's office of said court, pursuant to said bill, otherwise the said bill will be taken pro confesso.

A. REEVES AYRES,
Clerk.
By R. M. Hopkins,
Deputy Clerk.

P. H. WINSTON,
U. S. Attorney.

United States Marshal's Office, District of Washington. } ss.

I hereby certify that I received the within writ on the 2nd day of May, 1892, and personally served the same on the 11th day of May, 1892, by delivering to and leaving with Thomas G. Newman, said defendant named therein, personally, at the city of Fairhaven, county of Whatcom, in said district, an attached copy thereof.

Seattle, May 14th, 1892.

THOMAS R. BROWN,
U. S. Marshal.
By H. A. Bigelow,
Deputy.

Marshal's Fees, $19.00.

[Endorsed]: Subpœna. Filed May 14, 1892. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.
No. 163.

Præcipe for Appearance.

To the Clerk of the Above-entitled Court:

You will please enter my appearance as solicitor and counsel for defendant in the above-entitled cause.

THOS. G. NEWMAN,
Solicitor and Counsel for Defendant.

Office, Fairhaven, Washington.

[Endorsed]: Præcipe for Appearance. Filed June 6, 1892. A. Reeves Ayres, Clerk. R. M. Hopkins, Deputy Clerk.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.
} Equity.

Stipulation Extending Time to Plead.

It is hereby agreed and stipulated by and between the solicitors and counsel for the complainant and defendant in the said cause that the said defendant may have until the rule day of August 1st, 1892, in which to plead herein.

P. C. SULLIVAN,
Asst. U. S. Atty.

THOS. G. NEWMAN,
Solicitor and Counsel for Deft.

[Endorsed]: Stipulation. Filed July 25, 1892. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation, Defendant. } Equity.

Demurrer to Bill of Complaint.

The demurrer of the Bellingham Bay Boom Company, defendant, to the bill of complaint of the United States of America, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein set forth, doth demur thereto; and for cause of demurrer showeth that the said complainant hath not by his own showing made out a case which establishes a right or interest in the subject matter of this action, and that said complaint does not state facts sufficient to entitle complainant to the relief prayed for. Wherefore, and for divers other defects and causes of demurrer appearing in the said complainant's said bill, this defendant doth demur thereto, and humbly demands

the judgment of this Honorable Court whether it shall be compelled to make any answer to said bill and prays to be hence dismissed, with its reasonable costs in this behalf most wrongfully sustained.

THOMAS G. NEWMAN,
Solicitor for Defendant.

I hereby certify that, in my opinion, the above demurrer is well founded in point of law.

THOMAS G. NEWMAN,
Solicitor for Deft.

[Endorsed]: Demurrer. Filed July 29, 1892. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Monday, July 2, 1894. General Order Book No. 2, page 437.

UNITED STATES,
vs.
THE BELLINGHAM BAY BOOM CO.

Order Overruling Demurrer to Bill.

Now, on this day this cause comes on to be heard upon defendant's demurrer to the bill of complaint on file herein, and the Court, being sufficiently advised in the premises, overrules said demurrer, and the defendant is here

and now allowed twenty days from this date in which to answer.

In the Circuit Court of the United States for the District of Washington, Northern Divison, Ninth Circuit.

IN EQUITY.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
THE BELLINGHAM BAY BOOM COMPANY, Defendant.
No. 163.

Answer.

The answer of the Bellingham Bay Boom Company, the defendant, to the bill of complaint of the United States of America, plaintiffs:

This defendant, now and at all times hereafter, saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

1st. The defendant denies each and every allegation in plaintiffs' bill of complaint contained, not herein expressly admitted.

2nd. Admits that it is, and at all times mentioned in said bill of complaint was, a corporation organized and existing under and by virtue of the laws of the State of Washington. Defendant further says that it became incorporated in the month of June, A. D. 1890, under and by virtue of an act of the first Legislature of the State of Washington, entitled, "An Act to declare and regulate the powers, rights and duties of corporations organized to build booms, and to catch logs and timber products thereof." That under and by virtue of the said act and articles of incorporation adopted thereunder, power and authority were given defendant in the waters of the Nooksack River, in the said State of Washington, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of the defendant in catching, booming, sorting, rafting and holding logs, lumber, or other timber products, and to improve the said Nooksack River so as to facilitate the business of logging, driving, rafting, sorting, booming and holding logs, and protecting from loss those engaged in carrying on the same.

3rd. That the construction, erection and maintenance of defendant's boom was affirmatively authorized by the laws of the State of Washington in the month of June, A. D. 1890. That under and by virtue of the said laws of the State of Washington the said defendant, prior to the 19th day of September, A. D. 1890, did construct, erect and maintain its boom for the business purposes aforesaid, in strict accordance with the said laws of the

State of Washington, and not otherwise, at the mouth of the Nooksack River in the county of Whatcom, State of Washington, and has there continued to so maintain and operate its said boom up to this time. And defendant alleges that in the construction and maintenance of its said boom it has expended a large sum of money, to-wit, the sum of fifty thousand dollars.

4th. That the Nooksack River is a small stream lying wholly and entirely within the State of Washington, emptying its waters into Bellingham Bay, and navigable for but a few miles from its mouth by small light draught water craft.

5th. Defendant denies that its boom is constructed in such a manner as to blockade the said river during a large portion of the year, rendering navigation thereon impossible during said time; but alleges that at certain periods of the year, not to exceed twice in any one year, large quantities of brush, trees and drift are by freshets and excessive high water carried down to the mouth of said Nooksack River, where the said brush, trees and drift become lodged by reason of shoal water occasioned by the widening of said river, and the depositing of its waters into the said Bellingham Bay. Defendant further alleges that under and by virtue of the power and authority to improve the said river, vested in it by the said laws of the State of Washington, it has from time to time, from the date of its incorporation up to the present time, and covering a period of more than four years, expended large sums of money, to-wit, the sum of twenty-five hundred dollars per year, in the purchase of powder, tools, and

labor for the improvement of said river, by removing the said brush trees and drift from the mouth thereof, and removing trees, snags and drift from the channel thereof to a distance of twenty miles from its mouth. Defendant further alleges that by reason of the location and maintenance of its boom and of the improvement of said river made by the defendant as aforesaid, the navigation of said river for boats and water craft has been greatly facilitated, and that in the absence of such improvement to the navigation by defendant as aforesaid the mouth of said river would become entirely obstructed by brush, trees and drift, rendering navigation thereon totally impossible during the greater portion of the year.

6th. Defendant admits that it has not obtained permission of the secretary of war to construct or maintain its said boom, but alleges that at the time of the commencement of the construction, and at the time of the completion of the said boom, and at this time, there was and is no law commanding or directing the defendant to obtain such permission from the said secretary of war.

7th. That immense forests of fir and cedar timber, of the market value of many million of dollars, which constitute the chief wealth of Whatcom County, border and are tributary to the said Nooksack River and its branches, which said river is the natural and only outlet for most of said timber to the mills and market. That the commerce conducted and carried on upon said river by the transportation of goods, wares and merchandise is and always has been, trifling and inconsiderable in

amount, and in value greatly inferior to that of the logs and timber products floated down said river to the mills and market. That the defendant is informed and believes, and so alleges the truth to be, that during the four years last past the total value of all such goods, wares and merchandise so transported upon said river has not amounted to more than five thousand dollars, and defendant alleges that the market value of the saw logs and timber products floated down said river and caught, sorted, boomed and rafted at defendant's boom during the same period, amounts to ninety thousand dollars.

8th. That the greatest and chief value of the said Nooksack River to the citizens of this and other states of the Union is its use as an outlet for floating saw logs and timber products to the mills and market. That none of the timber situate upon and tributary to the said river as aforesaid can be taken to the mills and market by floating down said river without the maintenance of a boom located at the mouth thereof for catching, sorting, booming, holding and rafting the same. That there are a number of saw and shingle mills located on the shores of Bellingham Bay, which are largely dependent for their supply of saw logs upon logs floated down said river, and if deprived by such source of supply will suffer great damage and injury.

9th. The defendant further alleges that it has at all times maintained and operated its said boom in accordance with the laws of the State of Washington thereunto pertaining, and has always exercised great care that its said boom should not interfere with the navigation of

said Nooksack River by boats and water draught navigating the same.

10th. The defendant further alleges that the Congress of the United States has never exercised legislative control or supervision over the waters of the said Nooksack River, which in any manner controls or affects the location, maintenance and operation of defendant's boom, and this Court has no jurisdiction to grant any relief whatever in the premises, or to entertain plaintiffs' bill, and defendant alleges that the only courts lawfully possessing and having jurisdiction of the subject matter of this action and by law authorized to furnish any relief in the premises are the courts of the State of Washington.

Wherefore, this defendant, having fully answered to the said bill of complaint in so far as it is advised the same is material and necessary to be answered unto, denies that the said plaintiff is entitled to the relief, or any part thereof, in the said bill of complaint demanded, or any relief whatsoever; prays the same advantage of its aforesaid answer as if it had pleaded and demurred to said bill of complaint, and prays to be hence dismissed with its reasonable charges in this behalf most wrongfully sustained.

THOMAS G. NEWMAN,
Solicitor for defendant.

State of Washington, }
County of Whatcom. }

E. M. Wilson makes solemn oath and says: I am the president of the Bellingham Bay Boom Company, the above-named defendant. So much of the foregoing

answer, with the contents of which I am acquainted, as concerns the acts and deeds of the said defendant is true to the best of my knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

E. M. WILSON.

Subscribed and sworn to before me by E. M. Wilson this 19th day of July, 1894.

[Seal] THOS. G. NEWMAN,
Notary Public in and for the State of Washington.
Residence, Fairhaven.

[Endorsed]: Answer of Defendant. Filed July 23, 1894. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy

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In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA, Plaintiffs,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation, Defendant
No. 163.

Demurrer to Answer.

The plaintiffs demur to the second, third, fourth, fifth,

sixth, seventh, eighth, ninth and tenth paragraphs of the answer of the defendant filed in this cause, and for grounds of demurrer state the following:

I.

That the said paragraphs of said answer do not state facts sufficient to constitute any defense to the cause of action set forth in plaintiffs' complaint filed in this cause.

II.

That the facts set forth in said paragraphs of said answer are insufficient in law to constitute any defense to plaintiffs' cause of action.

Wherefore plaintiffs pray the judgment of this Court whether they shall make any other or further reply to said answer.

WM. H. BRINKER,
U. S. Attorney.

I, Wm. H. Brinker, United States Attorney for the District of Washington, and solicitor for plaintiffs in the above cause, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WM. H. BRINKER.

[Endorsed]: No 163. Demurrer. Filed Jul. 23, 1894. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

UNITED STATES,
vs.
BELLINGHAM BAY BOOM COMPANY. } No. 163.

Notice.

To the Above-named Defendant and Thos. G. Newman, its Solicitor.

You are hereby notified that the demurrer to the answer of defendant, in the above cause will be called up for hearing and disposition on the 13th day of December, 1894, at ten o'clock A. M. or as soon thereafter as counsel can be heard.

WM. H. BRINKER,
U. S. Attorney.

[Endorsed]: Original notice. Filed Dec. 8, 1894. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Return.—I hereby certify that I have personally served a copy of the within notice on the said Thomas G. Newman, at Fairhaven, Wash., on this the 4th day of December, 1894.

EMERY McGINNIS,
Deputy Marshal.

General Order Book, No. 3, page 68.

Thursday, December 13, 1894.

UNITED STATES,
vs.
BELLINGHAM BAY BOOM CO.

Now, on this day, this cause comes on to be heard on demurrer to the answer, and the Court, after hearing the argument of respective counsel, takes the matter under advisement.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.
No. 163.

Order Overruling Demurrer to Answer.

Now, on this 31st day of December, 1894, came on for hearing the demurrer of plaintiffs to the second, third,

fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the answer of the defendant, and the Court having heard the arguments of counsel for both plaintiffs and defendant, and being fully advised in the premises, denies and overrules said demurrer and each and every part thereof, to which the plaintiffs at the time excepted.

C. H. HANFORD,
Judge of said Court.

[Endorsed]: Order overruling demurrer. Filed Dec. 31, 1894. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
vs.
THE BELLINGHAM BAY BOOM COMPANY.

Replication to Answer.

The replication of the United States of America, complainants, to the answer of the Bellingham Bay Boom Company, defendant.

These repliants saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver, maintain, and prove their said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain untrue, and insufficient to be replied unto by these repliants. Without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all which matters and things these repliants are and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

WM. H. BRINKER,
Complainants' Solicitor.

United States of America,
District of Washington. } ss.

Wm. H. Brinker, being duly sworn, says that he is the attorney of the United States for the District of Washington, that he has read the foregoing replication and understands the contents thereof, and that the facts therein stated are true as he verily believes.

WM. H. BRINKER.

Subscribed and sworn to before me this 14th day of January, 1895.

[Seal] E. A. COLVIN,
Deputy Clerk U. S. District Court,
District of Washington.

[Endorsed]: Replication. Filed January 15, 1895. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
vs.
THE BELLINGHAM BAY BOOM COMPANY

Order Appointing Examiner.

Now, on this day, on motion of the United States attorney, R. M. Porter, Esq., is appointed special examiner in this cause, and directed after due notice to the respective parties, to hear and reduce to writing the proofs that may be offered by the parties hereto, together with all objections thereto, and certify and return the same to this Court with all convenient speed.

And the clerk of this Court is ordered to transmit to the

said R. M. Porter, without delay, a duly certified copy of this order, together with the papers in this cause.

Mch. 4, 1895.

C. H. HANFORD,
U. S. District Judge.

[Endorsed]: Order appointing examiner. Filed Mch. 4, 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

UNITED STATES,
Plaintiff,
vs.
THE BELLINGHAM BAY BOOM COMPANY,
Defendant.

Testimony.

March 25th and May 31st, 1895.

Appearances:

W. H. Brinker and T. F. Robertson, for plaintiff.

T. G. Newman, for defendant.

Witnesses all sworn by H. H. Peirce, deputy county clerk and clerk of the Superior Court of Whatcom county and a notary public.

C. M. MALTBY called.

Direct Examination by Mr. Brinker.

Mr. Newman. Defendant objects to the introduction of any and all testimony whatsoever offered on behalf of plaintiff for the folowing reasons: First, plaintiff, by the bill of complaint, has not made out a case which establishes a right or interest in the subject matter of this action. Second, plaintiff, in its bill of complaint, does not state facts sufficient to entitle it to the relief prayed for. Third, there is no equity in plaintiff's bill of complaint. Fourth, this Court has no jurisdiction either to entertain this action or to grant any relief whatever in the premises.

Q. Just state your name. A. C. M. Maltby.

Q. Where do you reside?

A. My home is in Lynden.

Q. In Lynden?

A. Yes, sir; but my present business is in Seattle.

Q. Your home is in Whatcom county?

A. Yes, sir.

Q. How long have you lived here?

A. Since the fall of 1884.

Q. Do you know where the Nooksack River is located?

A. Yes, sir, for 40 or 50 miles of it.

Q. Into what waters does the Nooksack River empty?

A. Bellingham Bay.

Mr. Brinker. It is stipulated by the parties hereto that the Nooksack River is a navigable stream, having its source in Whatcom county and running through Whatcom county to Bellingham Bay, emptying its waters into said bay, and its waters are navigable from its mouth for

a distance towards its source by light water craft and the waters of said river lie wholly within the said Whatcom County, State of Washington.

Q. How long have you known this river?

A. Ten or eleven years.

Q. Do you know the location of the boom of the Bellingham Bay Boom Company? A. Yes, sir.

Q. Where is it located?

A. It is just outside of the mouth of the river on the tide flats.

Q. With reference to the channel leading from the river into the bay where is the boom situated?

A. Nearly parallel, but crossing the original channel about three times.

Q. What does the boom consist of; how is it constructed?

A. There is a double row of piles driven 25 feet apart with a boom strung between them.

Q. Have you ever navigated that stream?

A. Yes, sir.

Q. For what length of time?

A. Nearly four years.

Q. Prior to the erection of the boom?

A. Prior and subsequent.

Q. And what way did you navigate it?

A. By steamboat.

Q. In what capacity did you act? A. Captain.

Q. How far could you ascend the river from the bay?

A. Twenty-five miles.

Q. During the time you navigated it?

A. Twenty-five miles during the extreme high water. I have only usually gone 20 miles to Lynden.

Q. About what size craft did you navigate?

A. It was registered 107 tons.

Q. And what draught?

A. From two to four feet.

Q. Do you know whether any other vessels ran upon that stream during the time you were familiar with it?

A. Yes, sir.

Q. About what number of vessels per annum?

A. Some seven or eight.

Q. What business were they engaged in?

A. General traffic; transporting farm produce and carrying supplies up the river.

Q. Freight and passengers?

A. Yes, sir, freight and passengers.

Q. At what time was this boom constructed?

A. I do not remember, but about 1889 or 1890, I think.

Q. 1889 or 1890? A. Yes, sir.

Q. What was the size of the piles of which the boom was constructed?

A. I should say from one to two feet.

Q. In diameter? A. Yes, sir.

Q. And how were they driven?

A. By what means?

Q. Were they driven in the bottom of the river?

A. They were driven in the tide bottom.

Q. How far do they extend above the surface of the water?

A. At high tide 10 or 12 feet, I should say.

Q. And at the ordinary stage of the water?

A. Half of the time when the tide is out they were part of them on dry land.

Q. Part of them?

A. Yes, sir, part of them.

Q. Before the boom was constructed there, what was the condition of the channel extending from the river into the bay? A. In what respect?

Q. As to whether it was open or obstructed?

A. It was entirely open and from four to six feet in depth below the ordinary surface of the tide flats.

Q. What was the depth of the water at low tide in the channel?

A. From one to three feet, according to the stage of the water in the river. Sometimes more at high water.

Q. At what season is the stage of the water affected?

A. At high water the channel is always full and overflows the banks.

Q. At the time of high water?

A. Yes, sir, at the time of the rise.

Q. What is the normal stage of the water?

A. At the mouth?

Q. Yes, what is the depth?

A. Two or three feet, perhaps—I hardly know.

Q. What would be the depth of the water in the channel at ordinary high tide? A. Six or eight feet.

Q. How often did the tide flow at that point?

A. Twice a day.

Q. After the boom was constructed how was the navigation of the river affected for water craft?

Mr. Newman. We object as incompetent, irrelevant and immaterial.

A. Obstructed.

Q. What experience have you had, besides the four years you have navigated this river, in navigating rivers?

A. None on steamboats.

Q. From your observation of the condition of the channel at the point where this boom is constructed, what effect did the construction of that boom have upon the channel as to shoaling it or deepening it?

Mr. Newman. We object as incompetent, irrelevant and immaterial; for the reasons first assigned in the objections to any testimony being introduced in his case.

A. It shoaled up so as to fill it up even with the tide flats and compel the river to cut a new channel.

Q. How was the shoaling effected?

A. Filling up with sand and snags.

Q. What caused the filling up of the sand?

A. Cutting off the current and changing the current of the river by the boom. There are large quantities of sand coming down all the time, and whenever it is filled it cuts out and flows in another channel.

Q. Would the presence of the piles retard the flow of the sand in any way towards the bay?

A. Somewhat, but not very materially, I should suppose; but as soon as the piles were driven it collected drift wood that shut off the channel entirely.

Q. How long after the boom was constructed until the channel was closed? A. Only a few weeks.

Q. And what has been its condition since?

A. Practically no channel any length of time. We had to run right over the tide flats and had to wait for a tide high enough to do it.

Q. Is there any navigation now upon that stream with water craft? A. I believe there is, occasionally.

Q. How do the water craft enter the stream?

Mr. Newman. We object, as no foundation has been laid showing that this witness is acquainted with the traffic on the river at this time.

Q. Not at this particular time, but since you stated the channel had been closed.

A. Sometimes you could not get in on account of the drift wood and logs and sometimes we worked our way through it?

Q. How would you work your way through it?

A. By removing the logs out of the way and working around them.

Q. Would that retard your progress any?

A. Yes, sir. Sometimes it would take two days to get in where otherwise it only used to take only an hour.

Q. To what extent, if any, has there been an accumulation of drift in the river at the point of the boom and upwards since the construction of the boom?

A. To a very large extent, filling the whole boom from one quarter to half a mile in length.

Q. Up the river? A. Yes, sir, up the river.

Q. How long since you have seen a boat go up the river there? A. Two years.

Q. You stated that this river emptied into Bellingham Bay; with what waters does Bellingham Bay connect?

A. Through Hale's Passage with the Gulf of Georgia, and Bellingham Bay channel with the rest of the Sound.

Q. Into Puget Sound?

A. Yes, sir, Puget Sound.

Q. And the Straits of San Juan de Fuca?

A. Yes, sir.

Q. And through the Straits of San Juan de Fuca to the Pacific Ocean? A. Yes, sir.

Q. Before the construction of the boom did or did not the Nooksack River, in connection with the waters you have just mentioned, form a continuous waterway from the head of navigation of the Nooksack River to the Pacific Ocean? A. It did.

Q. Can you give an estimate from your personal observation, of the amount of commerce by water craft on the Nooksack River prior to the construction of this boom at its mouth?

A. No, sir, not very closely. The first year I ran it was in the neighborhood of $3,000 on the river.

Q. For freight and passengers?

A. Yes, sir, freight and passengers.

Q. Of what did the freight consist?

A. Farm produce, and merchandise and supplies.

Q. Are there any settlements near the head of navigation?

A. It is well settled on the stream all along.

Q. How long has it been settled?

A. Twenty-five years since the first settlements were made.

Q. What other means besides this river have the set-

tlers on the Nooksack River of bringing in their supplies and shipping out their produce?

A. By wagon road alone, except those at Ferndale, who have access to the railroad.

Q. Prior to the construction of the railroad what means had they?

A. Only by wagon and the Nooksack River.

Q. Do you know anything of the logging industry on this river? A. By observation, yes, sir.

Q. By observation? A. Yes, sir.

Q. How has the construction of the boom at the mouth of the Nooksack River affected that industry?

A. It has induced considerable logging to be done, but I think at a loss.

Mr. Newman. I object to any opinion which the witness may imagine.

Q. I am not asking as to the result of it, but as to the floating of logs; whether it has been facilitated or obstructed?

A. In affecting the river above the boom?

Q. In getting out of the river.

A. It has obstructed the logs so they could not get out a good deal of the time at all, on account of the drift wood.

Q. Where would the drift wood be?

A. Next to the boom, mixed up with the logs.

Q. You spoke of the boom obstructing the channel and causing the water to flow out over the tide flats in other places; what effect did that have on navigation of that river?

A. Well, we could go in at half tide in the old channel. After that we had to wait for extreme high tides, as we had to run over the tide flats.

Q. What has been the effect of the presence of the boom at the mouth of the river upon the adjacent lands, from your observation?

Mr. Newman. We object as incompetent, irrelevant and immaterial in support of any of the allegations in plaintiff's bill of complaint, and further, this Court has no jurisdiction whatever to introduce any question or settle any controversy relative to any injury done to real estate owing to the construction of defendant's boom, and further, that the witness has not shown that he has any acquaintance with the question, and no foundation has been laid.

A. It has backed up the water and overflowed the lands, but to what extent I do not know.

Q. Are there any lands there near the mouth of that river that belong exclusively to the United States or are reserved by the United States?

Mr. Newman. We object for the reasons assigned in the last objection, and further, that the witness has not been shown to be acquainted with the matter involved in question and no foundation has been laid, and not the best evidence.

A. The Indian Reservation.

Q. What reservation is it?

A. I think they call it the Lummi Reservation.

Q. How far is it from the river?

A. It adjoins the river on the west.

Q. Does it extend down to the mouth of the river?

A. Yes, sir, and beyond.

Q. What effect has the boom had on the lands of that reservation.

Mr. Newman. Same objection.

A. The same as on the other lands, because it is most contiguous to it. The boom is on the reservation land itself.

Q. Are there any buildings on the reservation near the boom? A. Yes, sir, the village of Lummi.

Q. How has that village been affected by the waters?

Mr. Newman. Same objection.

A. I do not know as it has been materially affected.

Q. If there is anything else you know about which I have not asked you concerning this matter you may state it. A. I do not know as there is anything material.

Q. Do you know whether or not any harbor line has been established at the mouth of the river?

Mr. Newman. We object as incompetent, irrelevant and immaterial, and not in support of any of the allegations in plaintiff's bill of complaint, and further, no foundation has been laid and the question is indefinite.

A. Not that I know of.

Q. How far is the mouth of the river, where it enters Bellingham Bay from any city or town?

Mr. Newman. We object as incompetent, irrelevant and immaterial, and not supporting any of the allegations in plaintiff's bill of complaint.

A. The Indian Reservation and the town of Lummi is right at the mouth, or only a few rods above.

Q. How far is it from any incorporated town or city?

A. It is six (6) miles from New Whatcom.

Q. If there is anything else you have not been asked about, you state it, that occurs to you.

A. Nothing that I think of that is material.

Cross-Examination by Mr. T. G. Newman.

Q. What do you mean by saying you have known the Nooksack River 10 or 11 years?

A. I navigated it by canoe and boat 11 years ago last fall.

Q. How long ago?

A. 10 or 11 years ago last fall.

Q. By canoe and boat? A. Yes, sir.

Q. What kind of a boat; steamboat?

A. Canoe and skiff.

Q. Then the acquaintance you have referred to was that which you formed by navigating it in a canoe or skiff?

A. Personally, but I had business with the steamboats and traffic on the steamboats.

Q. But your personal knowledge was confined to the knowledge you refer to?

A. No, sir; I spent two or three days in getting some sawmill machinery up the river on steamboat.

Q. How long ago? A. Ten years.

Q. Ten years? A. Ten or eleven years.

Q. How long did it take to get it up?

A. A couple of days.

Q. Two or three days, you said before?

A. Yes, sir.

Q. Why?

A. Because the river was high and there was a good deal of drift wood running.

Q. Did that drift form in a jam? A. No, sir.

Q. Steamers ran and passed freely out of the mouth of that river? A. Yes, sir.

Q. Were you around the mouth of the river to any extent prior to the time you began steamboating?

A. Yes, sir; considerable.

Q. How often did you have occasion to pass up there?

A. I could not say exactly how often, but frequently.

Q. Can you approximate it?

A. Several times a year.

Q. How many times approximately?

A. Perhaps ten or fifteen times.

Q. Ten or fifteen times a year? A. Yes, sir.

Q. Ordinarily before you began steamboating when you had business at Whatcom you went by wagon road, did you?

A. I do not know as we went more often than by water.

Q. Don't you think you did?

A. No, sir, because the steamer was running every week, and I did business on the steamboats.

Q. You were delayed two or three days ten or eleven years ago in getting machinery up the Nooksack River to Lynden? A. Yes, sir.

Q. Do you know where the channel or deepest water at the mouth of the Nooksack River is at the present time? A. No, sir.

Q. When did you first begin steamboating on the Nooksack River and in what capacity?

A. That was in 1887, July, as captain.

Q. July, 1887? A. Yes, sir.

Q. As captain? A. Yes, sir.

Q. On what craft? A. The Triumph.

Q. A steamer? A. Yes, sir.

Q. Is that the only water craft you ever commanded?

A. No, sir.

Q. What other?

A. Minnie M. and Steamer Advance.

Q. Did you navigate all those boats on the Nooksack River? A. Yes, sir.

Q. You began in 1887 and for how long did you continue steamboating on that river?

A. Nearly four years.

Q. You quit then about the summer of 1891?

A. The summer of 1892, I think; it may have been 1888 when I commenced. I do not remember exactly.

Q. You can surely tell within a year when you commenced steamboating?

A. I have not the date with me.

Q. You can tell within a year; is that correct?

A. I think it was in 1888 instead of 1887.

Q. Then you were mistaken in saying 1887?

A. Yes, sir.

Q. Then you think it was 1888? A. Yes, sir.

Q. Did you command the Triumph?

A. Yes, sir.

Q. Did you own her? A. Yes, sir.

Q. How long did you own her?

A. As long as she ran.

Q. How long did she run?

A. About four years.

Q. When did you command the Minnie M.?

A. It was three years ago last fall.

Q. Two years ago last fall?

A. Three years ago.

Q. You first took command of her when in command of the Triumph?

A. No, sir, after the burning of the Triumph.

Q. When did the Triumph burn?

A. The 16th of July, 1891.

Q. Then it was not three years ago last fall, was it?

A. Two years ago last fall.

Q. But you stated three years ago.

A. Yes, sir.

Q. Then you were mistaken?

A. Yes, sir, it was two years ago.

Q. Where did you operate her?

A. On the bay and on the river.

Q. Went up the river on her, did you?

A. Yes, sir.

Q. How long did you command the Minnie M.?

A. I do not remember just how long; not long.

Q. To the best of your recollection.

A. Perhaps a couple of weeks.

Q. Not longer than two weeks?

A. Two or three weeks.

Q. How many trips did you make up the Nooksack River with the Minnie M.? A. Two or three.

Q. When was that?

A. At the time I was commanding her.

Q. Along in the summer; July or August?

A. Yes, sir.

Q. When did you command the Advance?

A. Along about the same time. Just before or just after, I do not remember just which.

Q. Before or after you commanded the Minnie M.?

A. Yes, sir.

Q. You do not remember which? A. No, sir.

Q. You commanded and ran upon the Triumph continuously until she burned? A. No, sir.

Q. You didn't?

A. No, sir; one time there was a month that I was off.

Q. When was that?

A. I think it was—I do not remember just the date.

Q. Was it during that month when you were not commanding the Advance?

A. No, sir.

Q. Then you must have commanded the Advance after the Triumph burned and after you were through with the Minnie M.; isn't that correct?

A. I do not know.

Q. You do not know when you commanded the Advance? A. No, sir.

Q. Can you give the year?

A. I think it was in 1892.

Q. What? A. I think it was in 1892.

Q. You think it was in 1892? A. Yes, sir.

Q. How long did you command the Advance?

A. Only one or two trips.

Q. During that time did you make any trips up the Nooksack River? A. Yes, sir, to Ferndale.

Q. How many times? A. Once.

Q. What was the date, to the best of your remembrance? A. I do not remember.

Q. Could you approximate it by fixing the month?

A. No, sir.

Q. But it was in the year 1892? A. Yes, sir.

Q. Are you a navigator, captain?

A. I stated the extent of my navigating.

Q. Have you ever made any study of navigation?

A. No, sir; not particularly.

Q. Your experience as a navigator and captain of water craft is confined solely to the four years you commanded the Triumph together with the experience on the Minnie M. and the Advance?

A. Practically, yes, sir.

Q. You said there were seven or eight steamers running on the Nooksack River? A. Yes, sir.

Q. Indicate more specifically when that was.

A. Since I have known the river.

Q. You mean during the last eleven years then?

A. Yes, sir.

Q. And you do not mean to be understood that at any time there were 7 or 8 steamers on the Nooksack?

A. No, sir; that was not my answer.

Q. Can you furnish the names of those steamers?

A. I think I can.

Q. Just give them.

A. The Washington, Monroe, Gazell, Triumph, Ad-

vance, Minnie M., Edith R., and the Edith, and two or three others that I cannot recollect their names now.

Q. Were those of about the same character relative to draught of water as the Triumph?

A. No, sir, some were a good deal larger.

Q. Some were a good deal larger? A. Yes, sir.

Q. Do you know the draught of any of those boats?

A. The Washington drew 7 feet; the Monroe about 5 or 6, and the Gazell 3; Edith 2 1-2 and the Edith R. about the same.

Q. When did the Washington run?

A. In 1884, 1885, and 1886. She used to go to Ferndale. I do not remember just when; somewhere about those years.

Q. How do you know she drew 7 feet?

A. That was the reported draught; I never measured it.

Q. You only know from hearsay?

A. That is all.

Q. You have seen that boat navigating the Nooksack River drawing seven feet of water? A. Yes, sir.

Q. What time of year was that?

A. I don't know; the summer time, I guess. The water is higher in the summer than any other time. There is always plenty of water in the summer time.

Q. Are you able to fix definitely the date of the construction of that boom?

A. No, sir; I do not think I can.

Q. Do you know when a boom was constructed in the mouth of the Nooksack River called the Nooksack River Boom? A. By Miller?

Q. Yes, sir. A. Yes, sir.

Q. When was that?

A. Just before the construction of this other boom.

Q. And you cannot tell within a year or so just when either was constructed.

A. No, sir, not positively. I do not remember the year.

Q. You testified as to the construction of the boom; you stated that the piles were driven about 25 feet apart.

A. I should judge that; I never measured them.

Q. That is your judgment?

A. Yes, sir; I know my boat was 21 feet and I could just crowd between them.

Q. There was a trip in the channel which was over three times that width?

A. Yes, sir, but there was a great many times when you could not go through it.

Q. That trip was over three times that width?

A. I think it was 70 feet.

Q. Seventy feet? A. Yes, sir.

Q. Whenever you had occasion to pass through the boom you passed through that trip?

A. Sometimes, but not always.

Q. How did you go through any other places if there were boom sticks?

A. We opened the boom sticks and went through.

Q. You opened the boom sticks? A. Yes, sir.

Q. When was it you were doing this?

A. When?

Q. Yes, sir.

A. I think it was the first that it was constructed mostly; we had to do that several times.

Q. And which boom was it; the Bellingham Bay Boom Company's boom or the Nooksack River Boom Company's boom?

A. The latter one was the Bellingham Bay Boom Company's boom?

Q. Yes, sir.

A. Yes, sir it was the Bellingham Bay Company's boom.

Q. Don't you know, as a matter of fact, that most of the piles in the Bellingham Bay Boom, without exception, are from 50 to 60 feet apart? A. No, sir, I do not.

Q. You do not know that?

A. No, sir, I do not.

Q. When you opened the boom sticks to get into the river, was that not when you went through the old channel of the river, which is about the trip.

A. No, sir, it was when we went over the tide flats.

Q. Do you refer to the point, Steamboat slough, which is above? A. No, sir, I do not.

Q. You do not refer to that point?

A. No, sir.

Q. Did I understand you state that before that boom was constructed the channel of the river at the bay was entirely open and from four to six feet deep below the tide flats? A. Yes, sir.

Q. Then before the boom was constructed you could pass up into the mouth of that river at any stage of low water with from four to six feet of water?

A. No, sir, I stated at half tide.

Q. You said it was from four to six feet deep below the tide flats? A. Yes, sir.

Q. Then it was from four to six feet deep at low tide?

A. Yes, sir, the channel was.

Q. Could you pass up that river at low tide with your boat? A. No, sir.

Q. How much did your boat draw?

A. From two to four feet if heavily loaded, and I said the water was from one to three feet deep in the channel.

Q. You stated that before the boom was constructed that the channel was from four to six feet deep at low tide.

A. Yes, sir, that is a fact.

Q. What did you mean when you stated that the draught of your boat was two to four feet. When heavily loaded she drew four feet? A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. With an ordinary load she would only draw three feet? A. Two and a half or three feet.

Q. This channel, before the boom was constructed, you testified you could take your boat up the river at low tide?

A. At half tide.

Q. You didn't testify that? A. No, sir.

Q. Didn't you say that the channel of that river over the tide flats at its mouth was from four to six feet at low tide? A. I did.

Q. Then if your boat only drew from 2 1-2 to 3 feet, why couldn't you take her up the river at low tide?

A. Because at low tide there was a bar across the whole flat.

Q. If there was a bar which obstructed that stream, why did you say the channel was four to six feet deep?

A. It was a fact.

Q. And you made that statement notwithstanding you knew there was a bar across the channel?

A. Yes, sir.

Q. So at that bar there was not four to six feet depth of water at low tide? A. I didn't say there was.

Q. Answer my question. (Question read.)

A. No, sir.

Q. On direct examination you never referred to any bar?

A. I was not asked. It was immaterial; I stated we could get in at half tide.

Q. How many bars were there at low tide across the channel of the river?

A. I never saw but one, and that was at low water mark.

Q. How much water over that at low tide?

A. Four or six inches or a foot or two; it depended on the tide.

Q. Then the river was absolutely impassable at its mouth for your boat at low tide?

A. Yes, sir.

Q. And no steam craft plying on that river there before or after the construction of the boom could pass through the mouth of the river at low tide?

A. No, sir.

Q. That is correct, is it?

A. Yes, sir, that is correct.

Q. Where was the channel of the river when you first navigated that river; where was the deep water at the mouth?

A. Through Steamboat slough.

Q. Steamboat slough is at the left as you come down and above the boom?

A. Yes, Sir.

Q. And at the time you first began to navigate that was the most navigable for steam crafts?

A. Yes, sir, and has been several times since, but is not now, I believe.

Q. The boom is constructed on the right-hand side of the bank as you approach the mouth of the river and below Steamboat slough?

A. Yes, sir.

Q. Don't you know it to be a fact that long prior to the construction of any boom in the mouth of the Nooksack River and up to the time of the construction of any boom there, the same difficulty existed by reason of shoal water at the mouth and by reason of logs, snags, and brush jamming at the mouth that has existed since the construction of the boom?

A. No, sir, but I know it is not true.

Q. Were you not very frequently obstructed by drift and snags at the mouth of that river prior to the construction of that boom? A. Never.

Q. Never were? A. No, sir, never.

Q. But you knew, did you not, that there was constructed, just prior to the construction of the Bellingham Bay Boom, another boom on the Nooksack River, which

is immediately above the defendant's boom, which boom was known as the Nooksack River Boom and owned by other parties?

A. Yes, sir, I know there was one constructed just before or about the same time.

Q. Which boom is it you have referred to in your direct examination?

A. The Bellingham Bay Boom; the latter one constructed.

Q. The latter one?

A. Yes, sir.

Q. The former boom, then, did not create any obstruction? A. Not seriously.

Q. Give the reason.

A. It is necessary to understand the construction of the boom and—

Q. Never mind. You testified that the boom shoaled the channel so as to fill it up even with the tide flats, causing it to cut a new channel?

A. Yes, sir.

Q. Where is the new channel?

A. I do not know; it is changed from day to day and from week to week. When the boom went in, the channel went out.

Q. And there never was a channel after that?

A. Yes, sir, there was a channel sometimes, but a shallow one.

Q. Before that boom went, in that channel never fluctuated? A. No, sir, it did n't.

Q. Where was it before the boom went there?

Through Steamboat slough, or down where the boom now is?

A. The Indians on the Reservation and the whites piled across the opening to throw the water into Steamboat slough, but when that went out it was outside.

Q. Outside of Steamboat slough?

A. Yes, sir.

Q. What do you mean; above?

A. No, sir, below, outside of the bay. Steamboat slough is inside of the land, or was.

Q. State where the main channel of the Nooksack River was at its mouth prior to the construction of defendant's boom, if you know.

A. The main channel was out where the boom is now; that is outside of Steamboat slough.

Q. When did a channel go through Steamboat slough?

A. At intervals it has been through there ever since I knew the river.

Q. Then prior to the construction of the boom there was a passage through Steamboat slough?

A. Yes, sir, and has been since. Sometimes Steamboat slough was the only one.

Q. Then the boom didn't cause that obstruction prior to the construction of the boom?

A. No, sir, they piled across the channel to throw all the water into Steamboat slough.

Q. Who did?

A. The Indians and whites.

Q. You state there is only a little navigation on the river at this time. You would not attribute it entirely to the construction of the boom?

A. No, sir, not entirely.

Q. Would you not attribute it mainly to the fact that we have a first-class plank road connecting with the cities of Whatcom and Ferndale, which cities, at the same time, are only ones accessible to the steamboats, and Ferndale is now connected with railroad with the cities of New Whatcom and Seattle; is not that the fact?

A. I believe that is a fact, yes, sir.

Q. You stated that it was two years since you saw a boat on the Nooksack river?

A. No, sir.

Q. That is what you said.

A. It is two years since I went up by boat.

Q. You were asked when you last saw a boat on the Nooksack River and you stated it was two years; is that a fact?

A. I have seen a boat on the river several times, but I have not been up.

Q. You mean to say you have not been up the river?

A. I have seen a boat on the river frequently.

Q. You said you could not give an estimate as to the amount of freight and passenger service on that river?

A. I have not paid any attention to it lately.

Q. I mean at the time you conducted it on the Triumph. Are you able to give a fair estimate of the freight and passenger business you conducted?

A. I can approximate it; that is all. It was about $3,000 the first year.

Q. And you intend to say to this Court that the first year you carried about $3,000 worth of products up and down that river?

A. My earnings on the river were about $3,000 for the first year.

Q. And you referred to earnings when you said $3,000?

A. Yes, sir, my receipts.

Q. You mean to say you received for freight $3,000 in one year's business upon the Triumph?

A. Yes, sir, that is what I state; $3,000 the first year in earnings.

Q. How many times did you go up the river that year? A. About once a week.

Q. What year was that?

A. That was the first year of its construction; I think it was in 1888. I have taken up single loads that have netted me $200.

Q. How much did you charge per ton for freight?

A. $6.00.

Q. From what point? A. To Lynden.

Q. And from Lynden to Bellingham Bay?

A. Yes, sir. From Lynden to Bellingham Bay it was from $4.00 to $6.00 per ton.

Q. Do you know what you can transport freight for to-day by water?

A. The prices have changed; no, sir, I have not asked.

Q. Do you know what it costs per ton for freight by wagon-load from Lynden here?

A. No, sir, I do not know.

Q. You know it is a good deal less than $6.00?

A. I think it is $3.00.

Q. Don't you know it is less than $3.00 a ton?

A. No, sir, I do not.

Q. Are you familiar with the logging and booming industry on that river, or elsewhere?

A. I have been engaged in the business more or less for thirty years.

Q. You have? A. Yes, sir.

Q. Where were you ever engaged in the boom business; what booms were you ever connected with?

A. My own booms; private booms in Minnesota.

Q. You had a private boom in Minnesota?

A. Yes, sir.

Q. Where located? A. In Ottertail County.

Q. On what stream?

A. Bluff Creek.

Q. What was the capacity of that stream?

A. How?

Q. Was it navigable for steam craft; how deep and how long?

A. Ten or fifteen miles long, thirty to fifty feet wide and from six inches to six feet deep.

Q. Steamers on it? A. I never saw any.

Q. It was not navigable for steam crafts?

A. No, sir.

Q. What was the size and capacity of your boom?

A. A million feet.

Q. Ever see a million feet of logs in it?

A. Yes, sir.

Q. How long did you maintain your boom?

A. Ten years.

Q. What was the name?

A. No particular name for it. I ran a sawmill and ran my own boom.

Q. Then you only did this for your own advantage?

A. Yes, sir.

Q. And you say that the boom at the mouth of the Nooksack River has obstructed logs so that they could not get out. That is why they are built, is n't it.

A. I think so.

Redirect Examination of Mr. W. H. Brinker.

Q. Look at this plat marked Plaintiff's Exhibit "A" and state whether or not you prepared that.

A. Yes, sir, I prepared that from memory as a rough sketch of the channels, as they were when I commenced navigating that river.

Q. Is that approximately correct?

A. Yes, sir.

Q. Does it show the condition of the situation at the mouth of the river now?

A. No, sir, I do not know the condition.

Q. At the time you saw it last?

A. Yes, sir, practically.

Q. I will ask what this part here is that is marked river?

A. That is the river above the mouth. Mr. Clark's house is in here somewhere.

Q. Mark that 1. What is that?

A. That is the Indian Village.

Q. Mark the Indian Village 2; and this is the west line of the bay as marked 3?

A. Yes, sir.

Q. What is this here?

A. The Nooksack boom as first put in the mouth of the river.

Q. Mark that 4. The Bellingham Bay Boom is what?

A. The defendant's boom.

Q. Mark that 5. What is this marked "River Channel"?

A. The direct channel out through the tide flats.

Q. Mark that 6. What is this marked "Line of Low tide"?

A. The line of low tide.

Q. Mark that 7. What is this?

A. Steamboat slough.

Q. Mark that 8. What is this here?

A. The north and east line of the bay.

Q. Mark that 9. What is this out here below the line of low tide?

A. Gradually deepening deep water.

Q. That is the bay? A. That is the bay.

Q. Mark that 10.

Mr. Brinker. We offer this drawing, marked Plaintiff's Exhibit "A," in connection with Mr. Maltby's testimony.

Q. Mr. Maltby, you said that prior to the construction of the defendant's boom you took some machinery up the river.

A. That was several years before.

Q. And that it took you two days to go up the river?

A. Yes, sir.

Q. And by what were you delayed? A. Drift.

Q. Was it a jam?

A. No, sir, it was a floating drift. Whenever the river rises it floats large quantities of trees and stumps and floating drift, and every stage of high water we were troubled a good deal and had to wait over a day or so to pass.

Q. What became of that drift before the boom was made?

A. It went directly to sea.

Q. Counsel asked if there was a trip in the boom and you said it was 70 feet wide? A. Yes, sir.

Q. Will you locate that on the plat you have drawn and mark it 11?

A. I do not know as I can. It was below this point in the river, probably in the neighborhood of the crossing.

Q. Out of the upper course of the channel?

A. Yes, sir.

Q. How was that trip constructed?

A. It was two timbers fastened together forming one stick the whole length.

Q. Extending from what point to what point?

A. From one group of piles to the next one.

Q. In what direction as to the channel?

A. Right across the channel.

Q. What obstruction did that trip cause to the navigation of the channel?

A. It had to be opened up for every entrance and exit to the river, and when the drift and logs came down it was impossible to open it.

Q. Before this drift and logs came down against this trip so as to obstruct the opening of it, what provision was made, if any, by the defendant company for opening that trip for the accommodation of the public?

A. They had men there whose business it was to open it on signaling, and it was usually done satisfactorily; we had no reason to complain, but sometimes we had to open it ourselves.

Q. At any time did the men employed on the boom fail to open it? A. Yes, sir.

Q. How long were you delayed by that?

A. We opened it ourselves and it was a very few minutes, as we had to go in just at the right time of the tide.

Q. How would you open it?

A. Send a man out on the trip and open it.

Q. Would the trip swing out of the way?

A. Sometimes had to be poled out of the way.

Q. How much time would that take?

A. From fifteen minutes to half an hour.

Q. Did you ever at any time have occasion to pass up that channel at night?

A. Usually at night in the spring and summer; the high tides came in the night and after the channel was closed up we could only get in at high tide.

Q. What provision had they made for that night opening?

A. We signaled for the men, and they usually came out.

Q. Did they ever fail to do it?

A. Yes, sir, several times.

Q. And on these occasions you had to open it yourself?

A. Yes, sir.

Q. Counsel asked you to name the vessels that plied on that stream during the time covered by your testimony in chief and you named several; do you remember any others now?

A. Yes, sir, I had occasion to take some machinery up the river about ten years ago and I employed a little steamer called the Pearl. She went up perhaps a dozen trips, not in my employ entirely. Then another, the first boat that went up, that went up before my time; I do not remember her name.

Q. Those you had personal knowledge of?

A. Yes, sir.

Q. What additional boats besides what you have named plied up the river after the construction of the boom.

A. I do not know as there were any; I do not remember of any.

Q. You do not remember of any others?

A. No, sir.

Q. I understood you to say there was a first boom; what was that called?

A. The Nooksack boom.

Q. The Nooksack boom was towards the Indian village from the channel?

A. It was inside of the other boom nearer the shore.

Q. You mean it was inside of where the other boom is now? A. Yes, sir.

Q. How near to the channel did that boom come?

A. It crossed the channel. They commenced building on the east side of the channel and drove piles down and put in a trip and continued piling down the river.

Q. How many times did that cross the channel?

A. Only once where the trip was built.

Q. Was that there at the time the defendant's boom was constructed? A. Yes, sir.

Q. What became of it?

A. It was absorbed by the other; it was all under one management.

Q. Were not all those piles removed from that boom?

A. Yes, sir, I removed some myself; I ran against one one night myself in the dark and removed it.

Q. Did the defendant company maintain the trip in the old boom after its construction? A. No, sir.

Q. That trip was left open?

A. Yes, sir, it was turned off.

Q. You stated that the channel was from four to six feet below the surface of the tide flats?

A. Yes, sir.

Q. I think that counsel misunderstood you; I understand you to say that is the depth of the ditch or channel through which the channel ran.

A. It was the depth of the channel; the depth is from the top of the bank to the bottom of the river.

Q. Would that channel be full of water?

A. No, sir, unless it was very high.

Q. In ordinary stages it was not?

A. No, sir.

Q. This bar you spoke of, where was it located?

A. At the line of low tide.

Q. Have you observed many rivers at the point of meeting the waters of the bay?

A. I have navigated almost all the waters on Puget Sound.

Q. Is it a common thing for a bar to form at the junction of the bay and the rivers?

A. Almost invariably as far as I know.

Q. Did you state that before the boom was built there were no obstructions at the mouth of the river by logs or drift accumulating at the mouth of the river?

A. None.

Q. None at all?

A. No, sir, there was not, never so as to make landmarks to guide into the channel.

Q. They would go right out into the deep water?

A. Yes, sir.

Recross-Examination by T. G. Newman.

Q. You have indicated a definition for a channel of a river that you did not indicate in your direct examination. Now you want to be understood that when you refer to a channel you only refer to that defined by banks?

A. That is what I understand by the channel of a river.

Q. And according to the definition you used, then the river has no channel after it reaches tide water?

A. After it reached low tide water.

Q. Then the river has a channel, has it, when what you term at low tide is covered by high tide?

A. Yes, sir.

Q. And you would not speak of it having a channel below low-water mark? A. No, sir.

Q. I understood you to say that the business experience you had as a navigator was confined to your experience upon the Triumph and upon the Minnie M. and the Advance.

A. That is what I stated as a master, but I worked upon the Anna M. Pence as mate.

Q. How long?

A. I do not know; two or three weeks.

Q. I supposed this morning we had covered your entire experience, but I find you have worked as master on the Anna M. Pence.

A. I said I had, but as mate.

Q. As mate, then? A. Yes, sir.

Q. State if you have had any other experience on steamboats. A. Nothing material.

Q. When was it you navigated almost all the waters of Puget Sound?

A. While running the Triumph.

Q. What other rivers?

A. The Skagit, Snoqualimie, and Snohomish.

Q. Navigated all those with the Triumph?

A. Yes, sir. I did and both the head of the bay at Tacoma and Seattle.

Q. You conducted your freight and passenger business down to Tacoma and Seattle.

A. Yes, sir, and up the rivers some little distance.

Q. Was the business conducted by you on the other rivers as extensive as on the Nooksack River?

A. No, sir.

Q. How many times did you go up the Snohomish River? A. Four or five times.

Q. How many up the Skagit?

A. Half a dozen times, perhaps a dozen.

Q. The Steilaguamish?

A. Not more than once or twice, perhaps twice.

Q. Then you spent considerable time in navigating other waters of Puget Sound?

A. Enough to know what their bars were at the mouths.

Q. Then you spent considerable time on other waters than on the Nooksack River? A. Not much.

Q. Would you call it such? A. No, sir.

Q. Most of your business was confined to this river?

A. Yes, sir.

Q. Were not the men at the boom almost universally within hail of you? A. Yes, sir.

Q. And reasonably attentive?

A. Yes, sir; I have no reason to complain.

Q. And willing to give you passage?

A. I said I had no reason to complain.

Witness excused.

M. J. CLARK called.

Direct Examination by Mr. W H. Brinker.

Q. Your name? A. M. J. Clark.

Q. Where do you reside?

A. At the mouth of the Nooksack River.

Q. How long have you lived there?

A. Sixteen years.

Q. About how far from the mouth of the Nooksack River is your residence?

A. My land goes to the mouth; it is meandered by the salt water. It is fresh water on one side and salt on the other, so I am right at the mouth.

Q. Do you know of the existence of an Indian village?

A. Yes, sir, it is right west of me on the opposite side of the river.

Q. How far from your house?

A. Less than a quarter of a mile.

Q. What is the name of that village?

Q. Do you know of the existence of a boom at the mouth of the Nooksack River?

A. I know of the existence of a boom or obstruction; I do not know what to call it; engineers say it is an obstruction.

Mr. Newman. We object, and move to strike out the answer of witness.

Q. Just state what you have observed in the nature of a structure used to boom logs at the mouth of that river.

Mr. Newman. We object as incompetent, irrelevant, and immaterial, unless it is the defendant's boom, no other obstruction having any reference to this case.

A. This is the last obstruction there now, but there were two before. The first was caused by the Kansas colony. They obstructed the river first. I do not remember when they came—10 or 12 years ago. They drove piles and hung boom stick.

Q. Where was that obstruction?

A. Right above where my house is, right at the mouth of the Slater slough; that is where they put in the first obstruction.

Q. Just indicate the point on that plat

A. Right there is the place they put in the obstruction. They drove three piles and made an obstruction for half a mile and jammed everything.

Q. Mark that "A." How long did that remain?

A. About a week until I and others took it out.

Q. When was the next obstruction put there?

A. When Miller obstructed it.

Q. Where?

A. Where it is now. They drove on our line. They drove a lot of piles across the flats through the channel and on the side of it. Miller, I believe, drove the inside row of piles and this defendant company drove the outside row, and hung boom sticks on that makes the obstruction now.

Q. Miller's boom. The first obstruction; is that it there?

A. Yes, sir. Miller's boom is a little on the inside towards the Indian village.

Q. That is marked 4?

A. Yes, sir. A great many of the Miller piles are standing.

Q. When was the next structure put there?

A. Miller and they both obstructed together.

Q. The next one after Miller?

A. It was these fellows—the present company.

Q. Where is that obstruction?

A. Right alongside of Miller's obstruction.

Q. On this plat?

A. Yes, sir, that side was Miller's.

Q. This? A. This is their row on the outside.

Q. Five (5)?

A. Yes, sir; there is just a little difference between the two row of piles; only 20 or 30 yards.

Q. How is it made?

A. Made by driving piles and hanging boom sticks.

Q. How far apart are the piles?

A. I do not know; I never measured. I judge twenty-five or thirty feet.

Q. How far do they extend from the point where the river leaves the upland down towards the waters of the bay? A. I think a mile; very near it.

Q. Do you know where the channel is?

A. We have none now.

Q. Before this boom was put in? A. Yes, sir.

Q. How were these piles driven with reference to the channel?

A. The piles crossed the channel in different places as the captain said.

Q. How many times?

A. I do not know, but I think more than once.

Q. Do you remember when these piles were driven there, the last ones?

A. I remember the time, but I do not remember the date.

Q. About how long ago was it?

A. I cannot tell. I have no book account with me. I did not think it necessary to have the date. I would have to bring the books. I let these gentlemen have one foot of my land for five years and I have it in my book and the auditor has it down stairs.

Q. At the time you executed this lease?

A. Yes, sir, when they were driving I gave them this lease.

Q. What effect did the driving of these piles, the last ones you speak of at the time the lease was made, have upon the navigation of the river?

Mr. Newman. We object, for the reason first given as an objection to all the testimony on this point.

A. It obstructed the navigation of the river by stopping the sand and logs coming down.

Q. How near is your house to the river?

A. I do not know exactly; something like 50 yards, more or less.

Q. Was it so situated that you could see the river when you were at the house? A. Yes, sir.

Q. State whether or not during the time you have been there there has been any navigation on that river by water craft.

A. I think there have been fourteen different steamboats on that river since I was living there.

Q. What size?

A. From the size of a steam launch to 100 tons.

Q. Do you know anything about their draught?

A. Some drew two feet of water and some, I guess, four or five or six or more.

Q. How far up the river did they go?

A. They usually went to Lynden when they could get up there, I think.

Q. Can you name the vessels?

A. Yes, sir, I can name them all. I have them written down. First the Addie that I know went up. Next the Fanny Lake, Gazelle, Edith, Chehalis, City of Quincy, Triumph, Pearl, Minnie, Minnie M., May Queen, Washington, Advance and E. D. Smith; those are all I remember that ran on the water.

Q. About how often did they make trips up and down the river?

A. When the river was high they made regular trips, but when it was low they had to wait. They used to leave the freight with me.

Q. About how often a week would they go up?

A. The Randolph used to make two trips a week and Captain Maltby the same, but sometimes it would only be one trip a week.

Q. You speak of the logs and drift coming down into the boom; just describe how they would come down and what became of them after the boom was constructed.

A. They came down as far as they could and when they met this obstruction they could not go any further and they stopped navigation; it filled up.

Q. How far up the river did this drift extend?

Mr. Newman. We object as incompetent, irrelevant and immaterial, indefinite as not pertaining in any manner to any obstruction placed in the river by the defendant company as fixing the date.

A. About how far?

Q. Yes, sir. A. About half a mile or more.

Q. What is the condition of the river now?

A. Not navigable at all, sir.

Q. Why? A. It is obstructed.

Q. What is the obstruction there now?

A. Logs and drift.

Q. Are the piles that form that boom still there?

A. Yes, sir.

Q. When I say that boom I mean the boom last constructed. A. Yes, sir; I know.

Q. Before the piles were driven at the mouth of the river you have mentioned state whether any drift came down the river.

A. There always has been drift coming down since I have lived there every time there was high water.

Q. What became of the drift?

A. Went out to sea or out into the bay. I suppose it went to sea. I saw no more of it.

Q. When was the first time you noticed any drift stopping?

A. After the Kansas colony obstructed the river somewhere about 10 or 12 years ago.

Q. And these piles you say you and others removed and opened the river? A. Yes, sir.

Q. When was the next time you discovered any drift stopping?

A. At the time the Miller Company drove piles again.

Q. When was the next?

A. They both drove together, these fellows and Miller.

Q. For what length of time has that river been open and navigable since the defendant constructed its boom down to the present time?

A. It was only navigable a very little; sometimes a boat would slip in, but ordinarily it si closed up altogether.

Q. How long has that lasted?

A. Mostly since that obstruction was put in at the mouth of the river.

Q. What effect does the obstruction have on the waters of the river?

A. It holds the water back and does not let it out; keeps it in.

Q. This Indian village you speak of, on what land is that? A. On the Indian Reservation.

Q. What effect has the obstruction in the river had on the lands of that reservation and the buildings, that you have noticed?

Mr. Newman. We object as incompetent, irrelevant and immaterial, as supporting no allegation in the plaintiff's bill of complaint contained and raising questions outside and beyond the jurisdiction of this Court, and in regard to which the defendant expresses surprise, and is not able to meet any issues on that question.

A. I can say what the Indians told me.

Q. Never mind that. Is there anything else connected with the construction of this boom by the defendant company which affected the navigation of that river that you know of that you have not stated?

A. Will you repeat that, please?

Q. (Question read.)

A. All I know is that it is destroying all our land on the Nooksack River.

Mr. Newman. We move to strike out the answer as incompetent, irrelevant and immaterial.

Witness excused.

J. M. KILCUP called.

Direct Examination by W. H. Brinker.

Q. State your name. A. John M. Kilcup.

Q. Where do you reside?

A. I live in Whatcom; I live on the boat. I run the steamer E. D. Smith.

Q. What position do you hold on the steamer?

A. Master.

Q. How long have you been in that capacity?

A. Five years; a little over five years.

Q. On the same steamer?

A. No, sir, on different steamers.

Q. Are you acquainted with the Nooksack River?

A. Yes, sir, some.

Q. Have you ever passed over the waters of that river?

A. Yes, sir, quite a number of times.

Q. Upon a steamer? A. Yes, sir.

Q. In what capacity were you acting then?

A. As master and pilot—captain you might call it.

Q. How long have you known the water?

A. About 25 years—I guess about that.

Q. Five years? A. No, sir, 25 years.

Q. Do you know when defendant's boom was constructed at the mouth of the Nooksack River?

A. Yes, sir, I saw them when they were working there, but I could not tell the time.

Q. About how long ago was it?

A. It was somewhere in 1889, I think; I do not know just when; we were always in a hurry when we got there.

Q. How many years ago was it when you saw them constructing the boom?

A. About four or five years ago.

Q. Before that boom was constructed what was the condition of the river for purposes of navigation?

A. It was all right.

Q. What obstructions were in that river, if any, before this boom was constructed?

A. There were not any. I was on the first boat before I was master or pilot, and it was all right then.

Q. What is the condition of the river now?

A. It is very bad.

Q. Can boats ply on the river now?

A. Not very well; I was up there two weeks ago and it took us four days to get out of the mouth of her.

Q. How many weeks ago?

A. Two or three weeks ago.

Q. Why couldn't you get out?

A. I had to go around and the water was high and we went around through a place that the Indians had cut through, and had to wait for high tide, and when we got outside of the piles there was not water enough.

Q. Why didn't you go through the channel?

A. It was all jammed up.

Q. With what?

A. Stumps and snags and saw logs.

Q. How is the boom constructed with reference to the channel?

A. It goes crossways and every way; I could hardly tell.

Q. This plat made by Mr. Maltby; examine that; is that substantially correct, or not?

A. Yes, sir, that is the boom.

Q. This marked 5; what is that?

A. That is the row of piles.

Q. That is the boom?

A. Yes, sir, but they have cross booms in there.

Q. Cross booms? A. Yes, sir.

Q. How many times does that boom cross the channel?

A. It must cross two or three times. The channel goes crooked as it naturally does and the boom goes straight.

Q. What caused the accumulation of logs and drift?

A. These piles and boom sticks there. When they would float out they would stop and the sand would accumulate and stop them.

Q. Before the construction of the boom was there any drift that came down the river—logs, etc.?

A. Yes, sir, as there naturally does. The banks keep washing and caving.

Q. Where would that drift go to before the boom was constructed?

A. Just followed the channel until it got outside and went to sea. There was never any trouble.

Q. Did it form any obstruction at the mouth of the river?

A. I never saw any while I was there.

Q. Something has been said of a trip in the boom where the boom crosses the channel; do you know anything about that? A. Yes, sir.

Q. How was that constructed?

A. Well, there is not much of a channel now where the trip is.

Q. At the time the boom was put there was there any channel?

A. There was a trip at the upper end, but it was moved down. Miller had a trip where the channel was, but they put the trip down where they thought there was a better chance and the boat had more room where it was constructed.

Q. How is it constructed?

A. It is 60 or 70 feet long and booms bolted together and a man to open it.

Q. How would you open it?

A. Get on it and open it and push it around, but if the tide was going out you had to put the boat on it and pull it open.

Q. What provisions, if any, had the defendant made for having that trip opened as boats would come to pass through?

A. They had a man there who was there most of the time.

Q. How long was he there; from what time to what time?

A. He might be off working; we would whistle, blow four whistles going down or up.

Q. Would it be opened?

A. Yes, sir; once in a while it would not be.

Q. How about it when he was not there?

A. We stopped and opened it ourselves; that part we didn't mind.

Q. How long did that man continue to remain there for the purpose of opening the trip; for how many years?

A. He was there for two or three years; the same man.

Q. Since that man left what provisions have the defendant made for having that trip opened?

A. They had a man there a little while, but he was not any good, but we had not gone up for some time, and now they have not any man.

Q. Steamboats generally have stopped going up there?

A. Yes, sir.

Q. Why have boats not gone up there?

A. We were not sure we could get up and we had to be on the extreme highest tide and the parties could not depend on you; didn't know whether you would come up or not.

Q. What prevented you?

A. The way the snags blocked up the channel and formed bars.

Q. What is the condition of the river now as to whether a boat can go in or out?

A. It will not pay any boat to go in out.

Q. Can a boat go in or out there?

A. It just depends—of course, a lots of men would go in and some would go in anyhow; if there is enough money in it you can get in anyhow. You could get her in with ropes and pull her in.

Q. Would that be necessary?

A. Yes, sir. Pull out some of the snags and let the water wash out and take out some of the obstruction. We could if there was enough money in it—say $9 or $10 a ton.

Q. About how far from the boom up the river does the jam extend?

A. Not far. I guess it is not over ¼ or ½ a mile.

Q. Between a quarter and a half a mile?

A. Yes, sir. But I think some loggers have opened it up and got their logs out.

Q. How soon after the construction of the boom by the defendant did the drift begin to accumulate?

A. The first high water that came along.

Q. The first high water? A. Yes, sir.

Q. About how long was that after the boom was built?

A. I suppose six months or so.

Q. When do they have the high waters in the river; what time of the year?

A. Along in the fall rains they go up with a quick rush. Whether it is winter or summer when warm rains come it goes right up.

Q. And the drift comes with high water?

A. Yes, sir.

Q. Do you know whether the defendant is removing or attempting to remove that drift?

Mr. Newman. We object as indefinite.

Q. At any time since the boom was constructed?

A. Yes, sir, they would work at the drift; they had to get the logs out.

Q. What would they do with the drift?

A. Push it to one side; any way to get the logs out.

Q. What I mean is, what has the defendant ever done to remove the drift from the channel to open up the channel?

A. I never was around there at any time to pay particular notice to see what they would do with it. Sometimes they would let some of it out,or it would get in their way. After high water they would go to work and get it about out and the next high water it would fill again.

Q. How would the channel be for purposes of navigation, if you know?

A. When they would have it all out and get things all right we could go up again for a trip or two by taking high tides.

Q. How long—I believe you stated it has been there five years?

A. Yes, sir, maybe six years; I said I didn't know exactly.

Cross-Examination by T. G. Newman.

Q. How old are you? A. I am 34 years old.

Q. How long have you had experience as a steamboat man? A. Oh, I guess about six years.

Q. Has that experience been principally confined to navigating in the bay and on the Nooksack River?

A. Yes, sir.

Q. You are pretty well acquainted with the nature of the Nooksack River as a navigable stream from its mouth to Lynden? A. Yes, sir, and other waters.

Q. In your judgment, is that river practicable for navigation above Lynden?

A. No, sir, not for the majority of the boats on the river, but I had one boat that would. She was light draught.

Q. How many towns are there along the Nooksack River at which boats stop—of any size?

A. Between here and the head of navigation?

Q. Yes, sir.

A. There is Marietta.

Q. That is outside of the mouth of the river; that is on Bellingham Bay?

A. Yes, sir, but that was one of our particular points.

Q. I mean up the river after you leave its mouth.

A. Ferndale and Lynden and then there are farmers all along.

Q. That is a very difficult stream to navigate at best?

A. Not very.

Q. You would not call the Nooksack river difficult to navigate?

A. I have navigated worse; you can run down at night; I never had any trouble.

Q. It is a very narrow and rapid stream?

A. Yes, sir.

Q. Didn't you have trouble with the boat getting away from you and the boat striking shore? A. No, sir.

Q. Do you remember on one occasion about 2½ years

ago when I was one of a party upon your steamer and coming down the river a current struck you and carried you in the shore and the boat stuck in the mud?

A. It did no damage.

Q. I didn't say it did any damage.

A. That was just fun to scare you fellows a little.

Q. Do you generally indulge in fun of that kind?

A. Yes, sir, as long as there is no damage done.

Q. You ran into the shore on that occasion just to furnish the passengers a little amusement?

A. Yes, sir.

Q. In your judgment would you not call the Nooksack River a very difficult stream to navigate?

A. I used to think so until running on the Skykomish River.

Q. Then you have been on streams even worse than that? A. Yes, sir, much worse.

Q. What time did you begin running on the Nooksack River?

A. I do not know; it was five years ago anyway.

Q. I would like to have you fix that as definite as you are able.

A. I have a very poor memory when it comes to dates. Something I have not been used to bothering myself with.

Q. About five years ago this time; that is the best of your recollection? A. Yes, sir.

Q. That is your first experience on that stream?

A. Yes, sir, five years or so.

Q. Your best judgment is five or six years?

A. Yes, sir.

Q. What boat were you navigating?

A. The Edith first.

Q. That was the whole name of the boat?

A. Yes, sir.

Q. Simply the Edith? A. Yes, sir.

Q. Were you the captain of the craft?

A. I was towards the last.

Q. Who was the captain at first?

A. Randolph was the first, then Emmet Hanley and then I bought an interest in her.

Q. Quite a small boat?

A. Yes, sir, about 58 or 59 tons.

Q. Was that the same boat that was subsequently taken out of the water here at Whatcom and carried out to Lake Whatcom on a wagon?

A. Yes, sir, but a pretty big wagon; you can move a brick house.

Q. A big wagon?

A. Yes, sir, or beams put on rollers.

Q. It was put on a big wagon?

A. No, sir, it was big wheels or rollers.

Q. Specially constructed?

A. Yes, sir, big wheels.

Q. How long were you on that boat?

A. Two years I think.

Q. Do you know how long you were on that boat prior to the construction of the defendant's boom?

A. Not a great while.

Q. You began, then, operating on that river as steamboat man but a short time prior to defendant's constructing the boom?

A. Yes, sir, but I had been up and down the river a good deal.

Q. I am speaking of your experience as a steamboat man. A. I was on the Nooksack.

Q. Read the question.

A. Yes, sir, and that is all I know about it.

Q. And you say from the time you began to navigate it a short time prior to the boom being placed there the river was easily accessible for steamboats?

A. Yes, sir, it was easy.

Q. And at that time when you first began operations you were not hung up or delayed by jams or snags at the mouth of the river? A. No, sir.

Q. Don't you know, as a matter of fact, if you were acquainted with the river prior to the time of the construction of defendant's boom, that that river was frequently jammed full of trees and brush carried down by the freshets so as to prohibit any traffic by steamboats up or down the river for long periods of time?

A. Yes, sir, slight.

Q. And these jams were in before any boom was there at all?

A. Yes, sir, but they were further up the river.

Q. Up the river in the channel where the river was confined by banks?

A. Yes, sir, when a tree fell across the banks.

Q. And these jams away up the river prevented the steamboats passing until removed? A. Yes, sir.

Q. Was that not the condition of affairs prior to the construction of the boom where the water shoals on the tide flats? A. I do not understand that.

Q. Read the question.

A. There was nothing there before.

Q. You didn't observe it there before?

A. No, sir.

Q. What boat are you operating on at the present?

A. E. D. Smith.

Q. Who is the owner and operator?

A. I am the master of her.

Q. You attend to the navigating of the boat?

A. Yes, sir.

Q. Who is the owner of it; who attends to the business carried on by that boat?

A. I attend to the business and take all jobs, but Mr. McGowen owns the boat and gives me authority to run where I like.

Q. And you report all business to him?

A. Yes, sir.

Q. And he is acquainted with the business of that boat? A. Yes, sir, certainly.

Q. And you account to him for all the business you do and the money received for freight? A. Yes, sir.

Q. How long have you been operating that boat?

A. Two or three or four months.

Q. During that time how many trips have you made up the Nooksack river?

A. We have made three trips altogether.

Q. Three trips? A. Yes, sir.

Q. You said something about receiving $9 a ton for freight; from what point was that?

A. From Lynden.

Q. What was the nature of that freight?

A. It was hops; four tons or a little over; the water was very low.

Q. When was that?

A. That was last—that was a little while after Christmas.

Q. A little while after Christmas?

A. Yes, sir, the water was very low and the parties telephoned to me and wanted me to bring the hops, and I said the amount was too small; you see I didn't want to say the water was too low, and I said I wanted $10 a ton.

Q. Where were they consigned to?

A. To Tacoma.

Q. You took them from there to Tacoma for $10?

A. Yes, sir.

Q. You do not mean to say it cost $10 a ton to take them from Lynden to New Whatcom?

A. I said $9.

Q. To Tacoma?

A. You can get freight from here to Tacoma for 75c.

Q. You do not want it understood that it is $9 a ton from Lynden to New Whatcom, but that is to Tacoma?

A. It is $10 to Tacoma.

Q. And you took the hops to Tacoma?

A. No, sir, we took them down here for $9 and transferred them, and gave the other fellow a dollar, if you want to know all the particulars about it.

Q. Was that the only freight there was up there at that time that you brought down?

A. We didn't stop to see; the water was falling and it was almost impossible to get up or down.

Q. That was the only freight you went to get or brought down?

A. I didn't expect he would take me up and I had to go when he did.

Q. Read the question. A. Yes, sir.

Q. Your idea is that such drift as snags and trees when carried down by freshets are caught on the boom and that forms the jam?

A. Yes, sir, the way it is constructed or the way it is fastened in there.

Q. Don't you know, as a matter of fact, that drift is occasioned not by the piles and boom sticks, but by the branches of trees as they come down striking on the bars long before they ever reach a pile or boom stick?

A. I know the nature of this river. If anything does lodge, the sand will work away.

Q. Read the last question to the witness.

A. No, the current is too swift.

Q. You think the piles and boom sticks of defendant's boom are the cause of all that drift stopping at the tide flats, or at the mouth of the river? A. Yes, sir.

Q. And you testify that these jams are not caused and did not form by snags and trees and brush striking shoal water long before they reached any boom sticks or piles?

A. No, sir, they are not so formed.

Q. Could not a cottonwood tree four or five feet by 100 feet long form a drift?

A. No, sir, because she comes in the water when it is 20 or 25 feet deep and it goes right down, and the water is so swift that it tears the limbs right off.

Q. How about the tide and the current affecting the drift?

A. That is different, but it would not affect it up in the jams. It would work more down in the way. As I said they kept working out some.

Q. You spoke of the trip being moved; it was moved down; do you know the occasion of the moving of the trip?

A. Mr. Miller was boss of the business.

Q. Of what business?

A. The boom business.

Q. What boom business?

A. Supposed to be his own.

Q. Then when you speak of the Miller boom you speak of a boom other and different than the defendant's boom?

A. He sold out to you and it is all the same thing now.

Q. How about the time when the trip was there?

A. I disremember when it was there.

Q. Then the first trip you first testified to was that of a different company? A. I do not care who owned it.

Q. You would not undertake to testify about facts if it was not in regard to the defendant's boom?

A. I was telling the facts.

Q. This Miller managed the Nooksack River boom, which was a different corporation?

A. I do not know the corporation; I know Miller was there, for he was boss.

Q. Then you do not know whether Mr. Miller was connected with the defendant's boom or not?

A. I heard he sold out his boom and he disappeared and so did his boom.

Q. What we want you to testify to is facts, not hearsay. A. I don't care who owned it.

Q. It does not make any difference to this defendant, I suppose?

A. It would be better for the defendant for them to fix it up for themselves.

Q. Don't you think it would be better to testify to facts for which the defendants are not responsible?

A. I am thinking of getting up the river and letting the government go and get up there and pull up the snags.

Q. Did the defendants ever refuse to let boats go up there?

A. They say they are not permitted to and have no right there.

Q. The defendant will not permit them?

A. The boat has been up there.

Q. Do you know anything about a trip placed by the defendant? Did the Bellingham Bay Boom Company have a trip there? A. Yes, sir.

Q. About this defendant's trip; what do you know about that trip?

A. When they bought the boom I suppose they bought the boom too.

Q. And you think they bought the responsibilities that a prior company might incur?

A. You might have improved and fixed it different.

Q. Confine your testimony to the trip which was in the defendant's boom, the Nooksack River Boom Company; it had a trip in the channel of the river?

A. I could not say it was a channel.

Q. Don't you know it had a trip there, which trip was made by heavy timbers being bolted together, which was opened to permit the passage of boats?

A. It let the booms out.

Q. Either to let booms out or to let boats in or out?

A. I didn't say so.

Q. What was your idea?

A. I don't have any idea; I want to go up the river.

Q. You went through the trip?

A. No, sir, not always.

Q. It was in the main channel?

A. No, sir, I could not say it was in the main channel; the main channel was where the water was the deepest.

Q. Don't you know, as a matter of fact, that the defendant company changed that trip from time to time?

A. The trip was not there since it was built.

Q. Read that question to the witness.

A. No, sir, I do not.

Q. You know there was a trip there in defendant's boom? A. Yes, sir.

Q. You passed through frequently? A. Yes, sir.

Q. Were not the men accommodating?

A. Yes, sir; I told them lots of times if they were away not to come, so we were accommodating to them.

Q. Isn't it a fact that when you went there frequently on a high tide at night they would come and open it?

A. Yes, sir, but we accommodated them.

Q. But they offered you every facility to get through?

A. Yes, sir.

Q. When you testified that the trip was 60 or 70 feet long, were you testifying as to the defendant's boom?

A. Yes, sir, that is the one.

Q. Is that the best of your judgment that that trip was only 60 or 70 feet wide?

A. It could not have been much wider for we got stuck in with a boom of logs.

Q. Don't you know that a boom of logs was frequently 120 to 160 feet across? A. No, sir.

Q. Don't you know that that trip maintained in defendant's boom was at least 120 feet across?

A. It might be.

Q. You said in your judgment that trip was only 60 or 70 feet?

A. I said it was that long anyway.

Q. If it was 120 feet you should not say it was 60 or 70?

A. I never kicked about it being too narrow.

Q. It was wide enough? A. Yes, sir.

Q. What is the length of an ordinary boom stick?

A. 60 or 64 feet.

Q. Did I understand you to get up that river you have to go to work and pull out snags yourself?

A. We are liable to do most anything.

Q. Since you have gone up during the last six months have you had any occasion to make any appliances to pull out stumps?

A. We never went near the boom, but went over the sand bar.

Q. There is a passage? A. Yes, sir.

Q. And when you testify as to being tied up four days you were part of the time on the flats outside of the boom?

A. No, sir, not a minute.

Q. Inside of the boom?

A. No, we were not inside.

Q. Where were you? A. On the side of it.

Q. Neither inside of the boom or outside; where were you? A. On one side of it.

Q. Outside of it, were you not?

A. We were not below or above it.

Q. Outside of it?

A. I think you mean outside of the bay.

Q. No, sir. A. We were right on the side of it.

Q. You say some loggers have been opening up the river a little?

A. Yes, sir, getting out some cedar logs for the mill at Pence's.

Q. Don't you know these loggers are men in the employ of Elery Rogers, who is the lessee of that boom; they are in his employ?

A. It seems like it or on their own hook.

Q. The fact is you do not know anything about it?

A. I do, for we towed a boom of logs out and are to tow another.

Q. It was for Elery Rogers?

A. No, sir, it was for them. Rogers gave them the logs to get their money out of it. And when they get their money they will pay us.

Q. And they were logging on the river for their particular benefit?

A. Yes, sir, and when they get them sawed up they are to quit.

Q. During the time you navigated that river, imme

diately after the construction of the boom and to the present time, don't you know that the defendant has expended a large amount of money there in labor, men and powder to keep that channel open?

A. Yes, sir, I have heard so.

Q. Have you not seen them blasting and at work right in the channel? A. Yes, sir.

Q. Then why did you say you heard so?

A. They might have spent a lots of money or made a lots of it.

Q. You have seen the men in the employ of the defendant company frequently at work right in the channel with tools and powder opening a passage through the drift to admit steamboats? A. They were getting logs out.

Q. And your theory is that it was for their own benefit, but not for the boats?

A. What they did it was for themselves.

Q. And you arrived at the conclusion it was for their benefit? A. Yes, sir.

Q. Could they have got in or out of that river except on high tide?

A. You cannot get in or out on high tide.

Q. Isn't it a fact, and always has been a fact, that after its waters meet and mingle with the waters of the bay they deploy and separate out and the channel becomes lost, so there is no well-defined channel?

A. That is after they get out within three feet of low tide.

Q. Within three feet of low tide? A. Yes, sir.

Q. Then the waters are lost in the waters of the bay?

A. Yes, sir.

Q. And that has always existed?

A. Yes, sir, and that is the way of all waters on the sound.

Q. Isn't it a fact that boats could not and cannot now go in or out of that river except at high tide?

A. At this time?

Q. Ever since you have known the stream.

A. They could go on half tide, as near as I can say; about a five or six foot tide. That is considered a half tide.

Q. When could you go in on half tide?

A. When running the Edith.

Q. When you first began? A. Yes, sir.

Q. And just as soon as the defendant put in its piles and boom sticks the channel got filled up?

A. I do not know what was going on before that.

Q. I am asking from your personal knowledge.

A. I never put it to my knowledge.

Q. What is the deepest draught boat that can navigate that river at its mouth? A. When, now?

Q. Any time since you have known the river.

A. The little Saranack used to go up, and she is supposed to draw six or seven feet.

Q. You have seen her going up the river?

A. No, sir, heard of her.

Q. When?

A. Before the boom company was in there. I have heard Barker say he had her up there.

Q. Since you have known the river what is your expe-

rience as to the deepest draught boat that can navigate that river?

A. These stern wheelers; there is none of them very deep draught.

Q. Can you give some figures?

A. Say four or five feet.

Q. Then you have known a boat drawing five feet that could navigate at the mouth of the Nooksack River passing up and down?

A. Whenever we get into the mouth we can go straight up.

Q. Answer the question. (Question read.)

A. What time?

Q. Any time. A. Five feet?

Q. Yes, sir.

A. Yes, sir, certainly; I have drawn that myself.

Q. What boat?

A. I ran the Triumph a while and had her loaded on the upper deck and all around.

Q. How much did she draw?

A. I put her down to the guards, and she drew five feet.

Q. That was an extraordinary occasion?

A. Yes, sir,

Q. You would not like to navigate very often with a boat of five foot draught?

A. I could take my stage of water. You can go up with a six foot draught, if the water is high.

Q. You never get water enough, do you?

A. We have too much sometimes and there is no water at all sometimes.

Q. How much does your boat draw now?

A. You can put her down to five feet.

Q. How much does she ordinarily draw?

A. Four or four and a half.

Q. When?

A. When she is loaded with 130 or 140 tons.

Q. You do not usually have that?

A. We were up for 100 tons the last time, but I was afraid of the bar and I only put 50 or 60 tons on.

Q. How much did you draw at the time you brought down the four tons of hops?

A. We drew about two feet; that is, about that; perhaps four or five inches more.

Redirect Examination by Mr. Brinker.

Q. You said you had made three trips within the last three or four months—within the last three months?

A. Yes, sir.

Q. Did you go from the bay into the river?

A. Yes, sir, from Bellingham Bay, and kept outside of the line of piling and went up in little middle channel, a very shallow channel, and went into the river just above the jam.

Q. What boat were you on? A. The E. D. Smith.

Q. Did you have any difficulty in getting up?

A. Not in going up.

Q. Did you have any difficulty in returning?

A. Yes, sir, we put on some lumber and put on a little too much.

Q. What caused the difficulty in returning?

A. We were drawing a little more water than when going up, and that was the cause of it.

Q. How much water were you drawing going back?

A. About three feet.

Q. You say you went up on the outside of the piles?

A. Yes, sir.

Q. On the east or west side of the piles?

A. Well, it is on the east side going up into the river.

Q. Going into the river? A. Yes, sir.

Q. Over the tide flats? A. Yes, sir.

Q. What was the stage of the tide going up?

A. Extreme high water.

Q. What was the stage of the water returning?

A. The same way.

Q. Why didn't you go up the channel from the bay?

A. It is all jammed up with drift wood and saw logs.

Q. You said on cross-examination that you saw persons who appeared to be working in the interest of the defendant company working in this jam taking out logs?

A. Yes, sir, as we were going up with the boat.

Q. What kind of logs were they getting out; drift logs or saw logs?

A. They paid most attention to the saw logs; the getting out of the saw logs.

Q. They were all mixed up together inside the boom?

A. Yes, sir.

Q. During the time you ran on the river about what was the value, per annum, of the products that were hauled in and out, merchandise hauled in and out?

A. I could not tell. Some trips we would have a pretty good load that would amount to about $100 or $150.

Q. That is, the freight would amount to that?

A. Yes, sir.

Q. What was about the value of the product that was shipped out during the time you were running there?

A. It amounted to a good many thousand dollars; some of the ranchers alone would have 100 tons of hay and potatoes.

Q. What did it consist of principally?

A. The produce?

Q. Yes, sir.

A. The most of that is hay and a little hops and potatoes and everything, and a good deal of other stuff going up. Families moving up and furniture and pianos and organs.

Q. Any merchandise shipped in for the use of the people? A. Yes, sir, lots.

Q. Do you know anything of the value of the logs that were drifted down the river—the saw logs—per annum during that time? A. I could not say.

Q. Can you give an estimate of about the number of feet of saw logs that would be sent down the river during any year?

A. There were a good many the first year they started in the first or second year, but in about two or three years there have not been any to speak of.

Q. Is there any logging carried on on the river now?

A. Not as I know of now. There might be but I do not know of it.

Q. In any of the trips you have been up and down the river during the last year or two, have you noticed any saw logs being floated down?

A. No, they have been getting out a few in one or two little camps, but they are all through, and that is the reason I think there is none now.

Q. Is there a bar at the mouth of the channel; a natural bar I mean?

A. You might call it a bar that is on all rivers where the water goes down below three or four feet at extreme low tide; then it is all bar.

Q. About how much water is there on the bar at ordinary low tide? A. On the bar?

Q. Yes, sir. A. At dead low tide?

Q. Ordinary low tide.

A. Not more than a foot.

Q. How high, in feet, is an ordinary tide there above low tide?

A. Eight or nine feet; that is, once in twenty-four hours. Half tide is twice a day.

Q. Ordinary high tide is eight or nine feet?

A. Yes, sir.

Q. At ordinary high tide you could go in with a vessel of seven foot draught? A. Not now.

Q. How much water should there be under the boom?

A. Five feet of water to handle a boat.

Q. Under the bottom of the boat?

A. As long as she doesn't touch ground.

Q. About how much water should there be under the keel of the boat?

A. About one foot under the keel.

Q. Is there any break on the bar? A. Break?

Q. Yes, sir, does it get rough?

A. No, sir, unless the wind is blowing in, but not much.

Q. But nothing like the break of the Columbia River?

A. No, sir, nothing that would endanger a boat.

Q. Where is the next shoalest place after you go up the river?

A. There should not be any after you leave the boom; that is, if the channel is all right.

Q. If the channel is in its normal condition?

A. Yes, sir.

Q. Have you noticed, at the point where the piles cross the channel, whether the channel is shoaled any?

A. It has some, but it is a pretty good channel still for when we struck with the boat some of the men took a skiff and followed the channel, and said it was a good channel, if a little work was done there.

Q. What kind of work was necessary to be done; dredging?

A. No, sir, some giant powder used and the pulling out of some snags and the piling pulled out.

Recross-Examination by Mr. Newman.

Q. About those hops; you say you got $9 a ton from Lynden to New Whatcom?

A. Just as I told you before.

Q. That is it? A. Yes, sir.

Q. There were four tons?

A. Yes, sir, four tons and something.

Q. What is that man's name that employed you?

A. I think it was Davis or Jones. They know at the wharf.

Q. Where does he live?

A. I didn't ask him, for I didn't think it was any of my business.

Q. Is he a rancher at Lynden?

A. I think a rancher would know better than to do a think like that.

Q. That a rancher would know better?

A. Yes, sir.

Q. Did you talk to that gentleman personally?

A. No, sir.

Q. You have never seen him personally?

A. I was at the other end of the telephone.

Q. Where did you telephone him from?

A. He was at New Whatcom and I was at Fairhaven.

Q. Did you collect the freight charges from him?

A. From him personally?

Q. Yes, sir.

A. No, sir, because I have not seen him.

Q. Could you form any opinion from his voice as to whether or not he was sane or insane?

A. I studied over that and then I asked him again and I came over to the Sehome Dock and there were witnesses there and they were surprised that he took me up.

Q. He could have sent them down over the plank road for $2.00 a ton?

A. Yes, sir, for $2 or $3 a ton.

Q. But paid you $9. A. Yes, sir.

Q. You have not sufficient knowledge as to what logging is being done on the Nooksack River so as to testify about it?

A. There is not much doing or being done.

Q. While mills on Bellingham Bay were operating four years ago there was a great deal of towing in the way of handling logs?

A. Yes, sir, for two years there was considerable done and I did some myself.

Q. You got a lot of towing from this defendant?

A. Yes, sir, but the Quickstep did the most of it. She had a contract, I think; we did a good deal of the towing of the last logs.

Q. You have testified relative to the amount of freight traffic that has been done on that river in past years?

A. Yes, sir.

Q. Isn't it a fact that at this time there is nothing like the demand of steamer traffic on the Nooksack River, because of the connection of New Whatcom and Lynden with a first class plank road?

A. We all know that around Seattle there is not near the traffic done. It is dull all over; I think that is a good deal the reason of it too.

Q. Don't you think if the business was as good to-day at Lynden and Ferndale that the traffic, by reason of the good wagon roads, would be greatly decreased on the river?

A. No, sir; if people were selling in big lots they would take a boat every time.

Q. Don't you know they can freight it in here a great deal cheaper than any boat could take it?

A. Now, people, time is not worth anything and they can take their teams and come in here.

Q. You think at the same time they have very little time so they can cart by wagon, but can pay $9 a ton to send by steamboat?

A. Yes, sir, some have money to help the steamboat people out.

Redirect Examination by Mr. Brinker.

Q. Is this road a natural or an artificial way?

A. It is mostly built for people back in the woods that cannot get to the river and it helps them out.

Recross-Examination by Mr. Newman.

Q. And these roads connect directly with Lynden and Ferndale from the city of New Whatcom?

A. Not directly to Lynden; it passes Lynden about ¾ of a mile.

Q. It is practically connected directly with Lynden. Practically a straight road?

A. I do not know; some come one way and some another until they strike the road. There are two or three ways to get to the plank road.

Redirect Examination by Mr. Brinker.

Q. Have you ever navigated any other stream besides the Nooksack River? A. Yes, sir.

Q. What other streams?

A. The Skagit, Snohomish and the Skykomish, which is considered the worst river on the sound and very few boats ever go up there. We get $10 or $12 for freight per ton, and it is 26 miles.

Q. What other waters have you navigated?

A. Those are all the waters there are; I have been up the White River some.

Q. The Nooksack River, before there were any obstructions in it, how did it compare with the other rivers?

A. It was better in this way: the other rivers along in the fall and winter get too low, but the waters in the Nooksack River keep up. I have been up that river every month of the year. Sometimes in very cool weather it got very low, but I have never been troubled with low water yet in that river, since I have been master of a boat.

Re-recross-Examination by Mr. Newman.

Q. Don't you know, as a matter of fact, that the Skagit River at low water is a better river for navigation than the Nooksack River when the water is high?

A. When you go further up?

Q. I refer to its navigable portion.

A. At Hamilton?

Q. How far up is Hamilton?

A. Fifty miles.

Q. Below Hamilton the Skagit is very easy for navigation?

A. From Mt. Vernon down it is good. The tide runs up that way.

Q. What is the matter with the navigation of the Skagit River from Mt. Vernon to its mouth?

A. The river shoals.

Q. The Skagit is shoaled from Mt. Vernon to its mouth because of the meeting with the tide?

A. It has two mouths.

Q. I am talking of the mouth of the Skagit River.

A. That is at the bay?

Q. That is what I am talking of.

A. We all know that.

Q. That river shoals from Mt. Vernon to its mouth?

A. No, sir, I don't say that.

Q. What do you say? A. I state the other thing.

Q. You do? A. Yes, sir.

Q. What other thing?

A. What I have testified to.

Q. You testified that from Hamilton to Mt. Vernon, even at low water, it was easier to navigate than the Nooksack River?

A. No, sir, I didn't state so at all.

Q. You didn't? A. No, sir.

Q. Isn't the Skagit River a good stream to navigate from Hamilton to Mt. Vernon?

A. No, sir, I said from Mt. Vernon down; up as high as Mt. Vernon it is good, because the tide goes there, but higher up the lightest draught boats do not run there.

Q. Can you remember distinctly what you testify to for five minutes?

A. Yes, sir, I can, certainly.

Witness excused.

JOHN METZ called.

Direct Examination by W. H. Brinker.

Q. State your name? A. John Metz.

Q. Where do you reside? A. Ferndale.

Q. Are you acquainted with the location and condition of the Nooksack River?

A. Some, yes, sir, acquainted so far as from Ferndale up to my place and down part ways.

Q. Ferndale is on the river? A. Yes, sir.

Q. How long have you lived near the river?

A. Twenty-two years.

Q. Have you ever been up and down the Nooksack River from its mouth to the head of navigation?

A. Yes, sir.

Q. How often?

A. About once a week; sometimes twice.

Q. Do you know when the Nooksack River Boom Company put in its boom at the mouth of the river?

A. I know they were putting it in, but what year I didn't pay any attention. I have not been past since they put it in, but before they put in the boom I was a navigator on the river. That is with a schooner or skiff or canoe.

Q. Is a schooner and a skiff the same thing?

A. No, sir; a schooner is one that carries 15 or 20 tons or a five ton boat. My boat that I call a schooner was one that carried a ton or a ton and a half.

Q. Before that boom was put in there, how often did you go up and down that river?

A. Once or twice a week.

Q. What was the condition of that river at that time as to the facilities for navigation?

A. It was good at that time when I was going up

and down, good for canoes, boats or steamboats; that is, after we had the jams out above about Ferndale.

Q. How was it at the mouth of the river?

A. The mouth of the river was clear at that time. No jams, none whatever.

Q. How was it at the mouth of the river for depth of water?

A. I could not tell; it was different between the tides. The way I went I could go through most any way. I didn't pay much attention to channels.

Q. Did you live near enough to the river to see whether any other boats were on the river at that time?

A. Yes, sir, I have lived near the river ever since I have been there, and I saw the first boat run and helped get up the first boat.

Q. What kind of a boat?

A. One that would carry 50 or 60 tons.

Q. What was the largest boat you ever saw?

A. The Monroe; I never saw the Washington. I saw the Addison; she drew the most water; she was the second steamer.

Q. How much would the Addison draw?

A. Five feet.

Q. How often was the Addison up the river?

A. It was only up a few times; that was 15 or 16 years ago.

Q. Have you been to the mouth of the Nooksack River since the boom was put in by the defendant company?

A. Yes, sir, I was once through there with the Triumph.

Q. That was a steamer?

A. Yes, sir, Captain Maltby's.

Q. How much did it draw?

A. It had a lot of hay for me.

Q. How much water did she draw?

A. I could not tell you. It was three or four feet. She was pretty well loaded.

Q. Did you have any difficulty in going through?

A. Yes, sir, we had trouble in one place where they opened the trip, or whatever you call it. They didn't get it open in time and the current drifted them down and they had considerable trouble to get in and the current threw them against the piles, and it caused such a jar that it nearly knocked part of the load off the boat.

Q. Before that boom was put in was there at any time any drift coming down the river?

A. Yes, sir; whenever there is any rise there is always drift and lots of it.

Q. Where would it go to?

A. Down the river to the bay, I expect; that is the place it always goes. I do not know any further, unless it stopped in the jam or boom.

Q. Before the boom was made, I mean.

A. It went right out to sea.

Q. You have been there since the boom was made?

A. Only once when I went through with Captain Maltby; I had no use for it.

Q. Have you been down to the boom since?

A. No, sir; I have shipped a good deal of stuff since, but I had no use to take the trip.

Q. You didn't go down?

A. No, sir, I generally send down the freight and take the team down myself.

Q. Then you do not know the condition of the mouth of the river now?

A. No, sir, not at all.

Q. At the time you had difficulty going out with the boat, was there any drift in there then?

A. No, sir, not in the channel, that I could see. There was lots of drift wood inside We didn't stop long enough, or at least I didn't pay any attention to whether or not there was any drift wood.

Q. About how many people live up that river?

A. I do not know how many, but it is all settled up pretty well. It is thickly settled.

Q. Do you know anything about the amount in value in produce that is sent out of that river every year?

A. No, sir, I could not come to that point. I know one thing, that my freight bill amounted to $500 or $600 a year. I paid that to the captain of the Triumph, but the last year I have not shipped any boat, for we could not get them up. I have 300 tons of hay now, but the captains say there is too much danger to come up and I have to store it.

Q. Could you ship it if the river was open for boats?

A. Yes, sir, I am ready to ship it now, but I cannot pay for the freight and the danger. There are a great many that are in the same way.

Q. Do you about the value of the amount of merchandise that would be shipped there in a year if the river was open?

A. There was a good deal shipped three or four years ago, but lately I could not tell you. It was all shipped by boats by everyone.

Q. What was the value of it at that time per annum?

Mr. Newman. State from your personal knowledge, or give some idea as to what you base your estimate on.

A. Generally the bills would not run up to less than $300 or $400, and they charged as high as $2.00 or $2.50 to Ferndale; that is as far as I know. They would go up twice a week, but I could not say what the value would be per annum at that rate.

Q. How often would the boats come in and out of the river?

A. Once or twice a week. One day we had four steamers there, so you see there must have been something to ship.

Cross-Examination by T. G. Newman.

Q. You referred to yourself as a navigator; you mean you navigated small craft occasionally through the river? A. Yes, sir.

Q. You do not mean to say you are a professional sailor?

A. Yes, sir, I believe I am as good as there is.

Q. Had considerable experience?

A. Yes, sir, on the bay. Any old settler had to learn it. I can navigate any small boat and will compete with any man and claim I am very good for a small boat.

Q. Define what a schooner is.

A. I mentioned a schooner. I call my boat a schoon-

er. Any boat that I called a canoe or skiff I called it that way.

Q. Define what a schooner is.

A. I am not much of a sailor to tell what a schooner is. I called my boat a schooner. I do not call myself a professional sailor outside of the Nooksack River, but I have done it on Bellingham Bay and the Nooksack River.

Q. Since the boom was built you have only been down there once, and that was the Triumph?

A. Yes, sir.

Q. And at that time the only difficulty that was experienced in getting through was occasioned by the trip not being opened quite soon enough?

A. That is what I judge. They didn't get it opened soon enough and the boat drifted.

Q. How much of a load did you lose?

A. None, but the shock when we struck the piles gave such a jar that the load came near going off.

Q. But didn't? A. No, sir.

Q. You didn't lose any of the load there?

A. No, sir, I didn't lose any.

Q. How far do you live from Ferndale?

A. A mile and a quarter, on this side of the river.

Q. On this side of the river?

A. Yes, sir.

Q. What direction towards its mouth; down?

A. No, sir, up.

Q. Up the river? A. Yes, sir.

Q. How far do you live from the closest point to the plank road leading to New Whatcom?

A. Half a mile from it.

Q. Half a mile from the plank road?

A. Yes, sir.

Q. How long have you been shipping hay by boat down the Nooksack River?

A. Up to last summer; last summer was the last time I shipped—late in the summer.

Q. When was the first time you ever shipped hay by the Nooksack River?

A. That was a good many years ago, I can tell you. I was the first man that shipped hay.

Q. Tell me when was the first time you shipped hay.

A. It must be as much as 15 years ago when I shipped hay on the steamer.

Q. What price did you pay per ton at that time?

A. $2.00 was the price on steamers from Ferndale.

Q. It was? A. Yes, sir, it was.

Q. Has that been the price up the present time?

A. The last two years it was down to $1.75.

Q. It was $1.75? A. Yes, sir.

Q. Do you know what it would cost you to freight your hay into New Whatcom over the new wagon road?

A. Yes, sir, I think I do.

Q. How much?

A. It costs me $3.00 a ton and I am shipping in every day.

Q. You say about three or four years ago there was a great deal shipped by water? A. Yes, sir.

Q. You are pretty sure of that, are you?

A. Yes, sir.

Q. You were shipping three or four years ago by the Nooksack River? A. Yes, sir, all my stuff.

Q. You could get boats when you wanted them to get your freight? A. Yes, sir.

Q. You did n't experience any trouble? A. No, sir.

Q. How long has it been since you have been troubled about a lack of steamboats, so you could not get your produce down?

A. I have been troubled pretty nearly since the boom was in, but this spring more than any time.

Q. More this spring than any other time?

A. Yes, sir.

Q. The fact is that this spring is the only serious trouble you have experienced in not getting boats?

A. That is all.

Q. What is the greatest amount of hay you have ever shipped in any one year? A. Three hundred tons.

Q. What year did you ship that amount?

A. It was about three years ago.

Q. You shipped 300 tons? A. Yes, sir.

Q. And that is the most you shipped at any one time?

A. Yes, sir, that is hay.

Q. Hay? A. Yes, sir.

Q. Do you recollect what boats took that?

A. The Triumph and Minnie M. I generally shipped it on one boat; there were two boats at the time; and on the May Queen, also.

Q. There were several on the river at that time?

A. Yes, sir.

Q. What others besides the Triumph, Minnie M., and May Queen?

A. There were so many I cannot tell all the names.

Q. What else have you been raising for shipment by river besides hay? A. Oats, potatoes, and apples.

Q. You shipped these in large quantities three years ago?

A. Yes, sir. I never hauled anything by wagon.

Q. What year do you think you shipped the most, including hay, oats, and potatoes?

A. About three years ago was the biggest crop of hay and potatoes.

Q. That was in 1892. A. Yes, sir.

Q. In 1893 did n't you ship as much?

A. I always had a good deal to ship, but three years ago I had the biggest crop.

Q. Your crop was heavier than ever before?

A. Yes, sir.

Q. How in 1891?

A. Yes, sir, I have shipped a good deal for ten years.

Q. You shipped a good deal in 1891 by river?

A. Yes, sir, a good deal since 1884.

Q. Just answer the question. You shipped a good deal in 1891? A. Yes, sir.

Q. And more in 1892 than any other year?

A. Yes, sir.

Q. And a good deal in 1893? A. Yes, sir.

Q. How about 1894?

A. I did n't ship any; there was only one trip I shipped on the boat, but have had to haul by team.

Q. Have you endeavored to get a boat to ship your produce on?

A. Yes, sir, only about a month ago I went to get a boat and could not get any.

Q. Whom did you apply to?

A. To Captain Kilcup.

Q. When you say that it costs you $3.00 a ton by road in here did you mean what you would value the cartage out, or what people would charge you?

A. No. I consider my time worth something and my team worth something, and it is a ton I haul to a load, and it takes a day to do it, and I consider my time and my team worth something.

Q. Do you know what it would cost to transport all the hay you have by team into New Whatcom?

A. I have tried some that wanted to earn something and they would not carry it for less than $2.00 a ton, and I would have to board them and the team besides.

Q. What would it cost you by rail?

A. I have not tried that.

Q. You do not know? A. No, sir.

Q. There is a railroad from Ferndale to New Whatcom

A. Yes, sir.

Q. And the same road runs to Seattle?

A. Yes, sir.

Q. And you have not tried the railroad?

A. No, sir.

Witness excused.

JOHN ANDERSON called.

Direct Examination by W. H. Brinker.

Q. State your name. A. John Anderson.

Q. Where do you reside? A. At Lynden.

Q. Is that on the Nooksack River? A. Yes, sir.

Q. How long have you lived there?

A. About six months at Lynden.

Q. Where did you live prior to that?

A. At Lummi.

Q. At Lummi? A. Yes, sir.

Q. How long did you live there?

A. About six months too.

Q. Where prior to that? A. Seattle.

Q. How long have you known the Nooksack River?

A. A little over a year

Q. When did you first see it?

A. The 17th of March, a year ago.

Q. What is your business? A. Fishing.

Q. Where have you followed your calling of fishing?

A. I first commenced at the mouth of the Nooksack River and fished there six months and then went up to Lynden.

Q. You say on the Nooksack River?

A. Yes, sir.

Q. Do you know anything of the existence of a boom at the mouth of the Nooksack River?

A. I do not know the distance of it.

Q. You know there is a boom there?

A. Oh! Yes.

Q. Describe that boom; how is it made?

A. There is piling driven across the channel in different shapes, which I cannot describe very well, but it crosses the main channel and also the other small outlets of the river.

Q. What is the condition of that channel now as to being open or otherwise? A. What?

Q. What is the condition of the channel where it leaves the main line and goes into the bay?

A. In bad condition.

Q. On what account?

A. On account of a jam.

Q. What kind of a jam?

A. Snags and trees that have drifted down the river and lodged there.

Q. Against what do they lodge?

A. Against the piling and the boom sticks that are hitched to the piling.

Q. How long has that condition existed?

A. I could not state only since I have been there. I understand it is getting worse.

Q. Has it been in that condition since you have known that river? A. Yes, sir.

Q. Is it possible for a steamer to go up that river?

A. It was not when I was at Lummi; it was impossible for a skiff to pass through.

Q. Did you ever go up the river? A. Yes, sir.

Q. How?

A. I first went up with a little sloop, which I had chartered to get up.

Q. How did you get in?

A. On high tide.

Q. Through what entrance to the river did you go?

A. We went in through the slip or trip.

Q. Where was that trip situated?

A. A good ways down the boom.

Q. How long did it take you to pass from the waters of the bay up into the river?

Mr. Newman. We object as incompetent, irrelevant, and immaterial. A. I should judge about an hour.

Q. What was in your way; what prevented your going in more rapidly?

A. It was going through the boom and there were shoals which were caused by a lot of rubbish.

Q. Have you seen any steamboats go up that river?

A. I have seen the May Flower—no, it is a little steamer, the May Queen.

Q. Were you there at the mouth of the river when it went in? A. Yes, sir.

Q. Did you see how she went in?

A. I have seen her often trying to get in, but she could not get in.

Q. What prevented her?

A. The jam, I guess; I didn't see anything else there.

Q. On those occasions when you saw her go in, how did she go in?

A. I expected she worked her way through.

Q. State what you know.

A. I was not on board.

Q. Where were you?

A. I was up the river when she was going through.

Q. Could you see her? A. Yes, sir.

Q. Could you tell where she got through and where she went in?

A. There was a time she worked in the river, but how she got up I do not know, I was not near enough, but I know she was stuck several times on the bars.

Q. How long did it take her from the time she reached where the waters go into the bay until she got into the head lands or between the banks of the river?

Mr. Newman. We object as incompetent, irrelevant and immaterial.

A. I could not exactly say, as I didn't pay any attention to it.

Q. Is that the only boat you ever saw go in there since you have known the river? A. Yes, sir.

Q. You did not know this river before the boom was built there? A. No, sir.

Cross-Examination by Mr. Newman.

Q. You say you first went to the Nooksack River about the 17th of March, 1894? A. Yes, sir.

Q. Where did you live prior to that time?

A. In Seattle.

Q. What business were you engaged in there?

A. Fishing.

Q. For what length of time did you reside in Seattle?

A. Three years.

Q. Where prior to that? A. Chicago.

Q. How long in Chicago? A. About four years.

Q. What business were you engaged in there?

A. Coal business and express business.

Q. Where did you reside prior to that?

A. I follow sailing.

Q. Where is that? A. On the different waters.

Q. Where were you born? A. In Norway.

Q. You say when you came to the mouth of the Nook sack River you passed through the trip?

A. Yes, sir.

Q. Did you have any difficulty in getting through the trip? A. A little.

Q. What was it?

A. There was a bar right in there at the time that we could not get over.

Q. On what tide did you go in?

A. It was in the evening.

Q. At high tide or low tide?

A. It was high tide.

Q. A high tide? A. Yes, sir.

Q. What is the size of your boat?

A. Seven tons.

Q. How much water does it draw when loaded?

A. About three feet.

Q. How much when empty—without a load?

A. I guess about—I don't know exactly. We had her always about the same; about three feet.

Q. Three feet? A. Yes, sir.

Q. And you testify you went through that trip at high tide? A. Yes, sir.

Q. And had trouble in getting through the trip at high tide? A. Yes, sir.

Q. After you got through the trip you had trouble with shoal water? A. Yes, sir.

Q. Between the trip and the mouth of the river?

A. Yes, sir.

Q. Have any trouble with a jam or drift?

A. Yes, sir, snags.

Q. Same as it is now?

A. It was not as bad as now.

Q. Very bad now? A. Yes, sir.

Q. You had a great deal of trouble in getting through there? A. Yes, sir.

Q. That was on the 17th of March, 1894?

A. Yes, sir.

Q. Could a steamboat have got through at that time?

A. It depends on the size of it.

Q. Such boats as navigate there?

A. A small boat could.

Q. The May Queen for instance?

A. I think she would have had quite a good deal of difficulty getting in there.

Q. On account of what?

A. The shoals and not water enough.

Q. Not water enough? A. No, sir.

Q. There was not water enough? A. No, sir.

Q. Was that the only reason?

A. That is the reason I seen.

Q. You went to fishing at Marietta?

A. At Lummi.

Q. How long did you fish there?

A. Six months.

Q. What kind of fish did you catch?

A. Steelhead and Spring Salmon and Silver Salmon.

Q. Who was with you? A. Chris Peterson.

Q. Where is he? A. At Seattle.

Q. Does he live with you?

A. He did at that time.

Q. Does he fish with you now? A. No, sir.

Q. And after you left Lummi you went up the river and located at Lynden? A. Yes, sir.

Q. Did you continue to fish in the Nooksack River?

A. It is my intention.

Q. Did you continue to fish there?

A. Yes, sir; I did.

Q. Did you continue to catch the same kind of fish?

A. That was my intention, to fish for salmon.

Q. Then for the last year you have been a fisherman on the Nooksack River? A. Yes, sir.

Q. You spent most of your time fishing for salmon?

A. Yes, sir.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. Where were you naturalized?

A. In Chicago.

Q. What year?

A. I could not state the year, but I have my last pap ers taken out in Seattle.

Q. Did you vote here in this county at the last election?

A. In Seattle.

Q. In Seattle? A. Yes, sir.

Q. You consider Seattle your home now?

A. Lynden is now.

Q. You stated on your direct examination that the jam at the mouth of the Nooksack River is in the same condi tion now as when you entered the river; always in the same condition it is now? A. When I left the river—

Q. Is that correct; didn't you so testify?

A. I said the river was worse when I left Lummi than when I came there.

Q. It is practically in the same condition now as when you came in?

A. There is a lot of drift stuff going down; it is worse.

Q. I say it was practically in the same condition?

A. Yes, sir.

Q. You say you have seen the May Queen go up the river? A. Yes, sir.

Q. Ever more than once? A. No, sir.

Q. At the time you saw her she went up the river?

A. Once.

Q. Saw her there no other time? A. No, sir.

Q. And the only time you saw her there she went up?

A. I have seen her try several times, but she could not get up.

Q. Did you see her try to get in but could not?

A. Yes, sir.

Q. How far were you from her?

A. Maybe it is a quarter of a mile.

Q. Maybe it is half a mile?

A. Yes, sir, maybe.

Q. How do you know what she was doing?

A. Trying to get in.

Q. How do you know whether she tried to get in a half a mile away, or was trying to get a boom of logs?

A. I saw her trying to get in and work her way up.

Q. Why did you observe she was trying to get up?

A. I noticed she was in trouble.

Q. How did you happen to testify in this case?

A. Because I was subpoenaed.

Q. Because I was subpoenaed?

A. And because I made out an affidavit.

Q. Who asked you to?

A. I thought it was my duty to do so.

Q. And whom did you go to and offer to make out an affidavit? A. A Justice, I think.

Q. Where?

A. I do not know where it was in town.

Q. You feel quite an interest in this case?

A. Yes, sir, in order to get that boom open so as to have a chance to make a living.

Q. Then you are here because you think it is going to help you to make a living? A. Yes, sir.

Q. And that is why you made an affidavit?

A. I guess it is right. My intention is so as to not prevent fish going up and other reasons.

Q. Your idea is that fish will run up better if there is no boom? A. Yes, sir.

Q. Therefore you would like to have this defendant have $70,000 worth of property destroyed so you could fish?

A. I want them to keep the river free from rubbish.

Q. You testify that it is caused by the boom?

A. Yes, sir.

Q. All your experience has been within the last year; since March 17th, 1894?

A. Yes, sir.

Q. You never saw that river before that time?

A. No, sir.

Q. You do not know whether it was jammed to just as great an extent before that boom was there?

A. I do not see—

Q. Say yes or no.

A. I never heard of it being jammed.

Q. Read the question. A. No, sir.

Q. And you come to the conclusion that because the boom is there the boom is responsible for the jam at the mouth of the river?

A. I say the boom causes the jam.

Q. And you base that on the fact that the jam is there; is that so?

A. I have nothing else to say; I think that the boom is the cause of the jam.

Q. Will you swear there is a jam against the boom sticks and piles of the defendant company at this time?

A. Yes, sir; up close against the piling.

Q. You will swear that the jam is crowded against the boom sticks and piling? A. Yes, sir.

Q. And these boom sticks and piles caused the jam?

A. Yes, sir.

Q. And was in that condition ever since you came here? A. Yes, sir.

Q. Don't you know, as a matter of fact, that at this time and ever since you have been on the river there is a wide open space of water; don't you know that is true?

A. There is not opening enough for my little skiff.

Q. Isn't it a fact that ever since you have been on the river there was a wide open space of water between the jam of logs and the drift and the piles and boom sticks of the defendant company? A. No, sir.

Q. And there is not any opening there now?

A. I do not know; I have not been there for six months.

Q. Then your testimony about the jam being worse is not hearsay?

A. I have not been there for six months.

Q. Then your testimony that it is getting worse is guesswork?

A. I have not been there for six months.

Q. Read the question. (Question read.)

A. Yes, sir; simply because if there is a jam there will be more coming.

Q. You do not know, as a matter of fact, whether that jam is there now or not?

A. That jam is there to-day, I have heard.

Q. You have been testifying to what you have heard?

A. Yes, sir, for the last six months, but prior to that I know.

Q. So everything you have testified to relative to the condition of the jam at this time is what you have heard?

A. For the last six months.

Witness excused.

GEORGE SLATER called.

Direct Examination by W. H. Brinker.

Q. State your name. A. George Slater Jr.

Q. Where do you reside?

A. In Ferndale precinct.

Q. How far from the Nooksack River?

A. About half a mile.

Q. How long have you lived there?

A. I do not know exactly; over 20 years.

Q. How long have you known the Nooksack River, if at all?

A. I have known the Nooksack River ever since I was large enough; over 30 years.

Q. Have you ever been up and down the river from the mouth of it any distance?

A. Yes, sir, from the mouth of it up past the forks of the Nooksack River.

Q. How far is that from the mouth?

A. About 30 miles, I should judge.

Q. Has that stream been a navigable stream since you have known it?

A. Yes, sir, as far as Lynden for the last 14 or 15 years.

Q. From its mouth to Lynden? A. Yes, sir.

Q. How far is it to Lynden?

A. About 16 miles, I should judge, from the mouth; more or less.

Q. Have you ever seen any boats plying on that river?

A. Yes, sir; several.

Q. About what sized boats?

A. From 50 to 100 ton boats; steamboats.

Q. About what would their draught be?

Mr. Newman. We object, as no foundation has been laid.

A. From three to five or six feet.

Q. Have you ever been to the mouth of the river?

A. Yes, sir.

Q. Do you know the situation of the defendant's boom there? A. Yes, sir, pretty near.

Q. Had you ever been to the mouth of that river before that boom was constructed? A. Yes, sir.

Q. Had you been up and down the river before it was constructed? A. Yes, sir.

Q. What was the condition of the river for purposes of navigation?

A. It was pretty fair for navigation for most of the year.

Q. What obstructions were there in the river prior to the erection of the boom at the mouth by the defendant?

A. Well, there were a few odd snags, but nothing to stop a steamboat from getting in.

Q. Have you seen the river since the boom was constructed? A. Yes, sir.

Q. Did you know where the channel of the river was as it passed through the tide flats of Bellingham Bay?

A. Yes, sir.

Q. How is the boom constructed with reference to that channel?

A. In the first place, when the boom was made, it was made all right with the channel, but driving the piles and putting in the boom sticks has thrown the channel one way and then another, until you can hardly see where it is.

Q. Did you see the drawing made by Mr. Maltby, Exhibit "A"? A. No, sir.

Q. Here it is; from looking at that is it about correct?

A. It is near enough; yes, sir. This lower part of the channel here keeps changing so you cannot locate it.

Q. How is that boom as to the plat?

A. The boom, as near as I can remember it, runs down pretty near parallel with the channel. The channel, as he shows here, varies, and crosses the boom once or twice. At first it didn't. There was a trip here; about there, I should judge.

Q. When were you last there?

A. I was down there last fall; November, I judge.

Q. What was the portion of the river then; that portion that runs across the tide flats?

A. There was a jam of logs and drift.

Q. To what extent?

A. About a quarter of a mile long, more or less.

Q. Extending up the river?

A. Yes, sir, from the boom up the river channel.

Q. Have you ever had any experience in steamboating?

A. No, sir.

Q. How much of a space, if any, was left through this boom and jam as a steamboat channel as you saw it?

A. There was not any.

Q. None at all? A. No channel.

Q. Have you ever done any shipping on the river?

A. Yes, sir; I have shipped a good deal of hay, potatoes and oats.

Q. Before the construction of the boom at the mouth of the river was there any produce shipped out on the river? A. Yes, sir, a great deal.

Q. About how much in value per annum?

Mr. Newman. We object, as no foundation has been laid.

A. I would not like to make an estimate.

Q. How much have you shipped yourself?

Mr. Newman. We object, as indefinite, no time being fixed.

A. That would depend; some years we would ship 30 to 50 tons of hay, and probably 20 to 30 tons of potatoes and 10 to 20 tons of oats.

Q. How is that jam at the mouth of the river you speak of formed?

A. It is formed by saw logs and drift of all kinds that come down the river.

Q. At what periods does the drift come down the river? A. Whenever there is a raise.

Q. A freshet? A. Yes, sir.

Q. Was there any drift coming down before the boom was constructed? A. Yes, sir.

Q. What became of it?

A. It went out through the channel to salt water.

Q. State whether or not there was any obstruction at the point where this boom now is before the construction of the boom. A. Not to amount to anything.

Q. Since you have known the river?

A. No, sir.

Q. How has the boom affected the depth of the water in the channel, if at all?

Mr. Newman. We object, as no foundation has been laid, the witness not having shown himself acquainted with the channel of the river.

A. It has shoaled it a great deal since the boom was in there. It is a great deal shallower than it was before.

Q. During the time that steamboats were running on the river about how many trips would they make per month or week?

Mr. Newman. We object, as no foundation has been laid, and no time has been fixed in the question; it is incompetent, irrelevant and immaterial.

A. It just depended; some times two boats would be running in opposition. Then they would run from once to twice a week, but as a usual thing one steamboat would run about once a week.

Cross-Examination by Mr. Newman.

Q. When was it you used to ship hay and potatoes by steamer?

A. For the last ten or fifteen years; that is before this last year. We have not shipped any this last year.

Q. Since the last year you have had a first-class wagon road down to Whatcom? A. Yes, sir.

Q. And it is much easier to haul down to Whatcom than ever before? A. Yes, sir.

Q. And within the last two years there has been constructed over the Nooksack River at Ferndale a first-class wagon bridge? A. Yes, sir.

Q. And prior to that you had to ferry everything across? A. Yes, sir.

Q. This last year you say you have not shipped anything by boat? A. I have not.

Q. You have brought your produce down by wagon?

A. Yes, sir, what I brought, but not all of it.

Q. Say eight or ten years ago, what did it cost per ton to ship down the river to New Whatcom?

A. It averaged about $2.00, if I remember right.

Q. $2.00? A. Yes, sir.

Q. And you lived quite near the mouth of the river?

A. Between Ferndale and the mouth.

Q. About four miles from the mouth?

A. Somewheres about that.

Q. That has been the prevailing rate about all the time; $2.00 a ton? A. On the steamer?

Q. Yes, sir. A. Yes, sir.

Q. In 1893 you shipped out by steamer?

A. More or less.

Q. Also in 1892? A. Yes, sir, I think so.

Q. And 1891 and 1890? A. Yes, sir.

Q. And prior to that? A. Yes, sir.

Q. There has not been much trouble with boats going up the river until the recent jam?

A. Not at the mouth of the river.

Q. They occasionally have trouble at different points on the river? A. Yes, sir, up the river.

Q. It is pretty rapid? A. Part of it.

Q. The part where it meets the tide waters is not so rapid?

A. Three or four miles from the mouth is the most rapid going to Lynden.

Q. The jam in the river at this time is the only one that caused any particular inconvenience to steamboats when in there at the boom?

A. That is the only one that has troubled them to amount to anything for the last four or five years.

Q. There is considerable of a jam in there now?

A. There was the last time I was up.

Q. What channel did the boats use to use prior to the construction of the boom at the mouth of the river?

A. They used the same one that they do now. I do not remember the year when that one opened up, but formerly, 10 or 15 years ago, they used the other.

Q. The one that swings around to Marietta?

A. Yes, sir.

Q. When did that one change from the Marietta side to the other side?

A. I do not remember, but it was at very high water. The Marietta channel was filled up as it is crooked.

Q. There was not any boom at the mouth of the river at that time?

A. There was no boom, for there was no channel there.

Q. There was no boom at the mouth of the Nooksack River at that time?

A. There was a boom stick; you could call it a boom; it was further up. There was a boom put in to turn the logs and throw them off into a slough.

Q. That was up in the channel?

A. Yes, sir, the main channel.

Q. And before the river goes into the waters of the bay? A. Yes, sir.

Q. That was a private affair? A. Yes, sir.

Q. There was no permanent, substantial boom?

A. No, sir.

Q. Then when the channel changed 15 years ago from the Marietta side to the Indian Reservation, that great change was not caused by any boom?

A. In the channel?

Q. Yes, sir, no boom caused that damage?

A. Not that I know of.

Q. The channel of that river frequently changes, doesn't it? A. No, sir.

Q. It don't?

A. Not the main channel.

Q. I mean after it reaches the tide flats?

A. Yes, sir.

Q. It shifts around?

A. Yes, sir, back and forth.

Q. And independently and without any obstructions?

A. More or less.

Q. And isn't that also true from the time it reaches tide water?

A. That depends on what you call tide water.

Q. The water of the sea from high tide line.

A. The water backs nearly to Ferndale.

Q. From the time it reaches high tide line?

A. That is what I call it to Ferndale.

Q. But you didn't refer to Ferndale when you spoke of the tide waters of Bellingham Bay.

A. Have you been speaking of the waters above or below the boom?

Q. I speak of the waters on Bellingham Bay; doesn't the channel frequently change below the high tide line of the waters on the bay, independent of any obstructions?

A. No, sir, not between half tide and high tide; it does not.

Q. Do you know that what is called the old channel of

the Nooksack River that extended from the main channel down into Lummi Bay? A. In the Gulf of Georgia?

Q. Yes, sir. A. Yes, sir.

Q. You live right near where the old channel branched off? A. Yes, sir.

Q. How far distant is the point where the old channel branched off from the mouth of the river?

A. It is between four or five miles, more or less; I will not say exactly.

Q. You live right there? A. Yes, sir.

Q. That old channel is now clear cut and well defined, is it not? A. It is nothing but a slough.

Q. That channel at this day is clear cut and well defined? A. You can tell where it is.

Q. Don't you know you can go in a boat, an ordinary skiff, from almost the present channel of the river to the Gulf of Georgia?

A. You can go within about a mile of the present channel; you can make it all but about a mile; there is a jam for a mile in that channel.

Q. Do you mean to swear that you cannot navigate with a skiff up that old channel of the Nooksack River to a point nearer than a mile to the present channel of the Nooksack River?

A. It might be less; I have not measured it. It may only be half a mile, but there is a jam.

Q. The Nooksack River used to empty into Lummi Bay through that old channel?

A. Sometimes it does now when the river is high.

Q. But at no ordinary stage of water does the river flow through the old channel? A. No, sir.

Q. That is not an outlet of the Nooksack River?

A. Not a navigable one.

Q. The waters do not flow through there at all at ordinary stages of water?

A. On an average stage of water there is no water running there.

Q. Did any boom cause that great change in the river?

A. No, sir, but a jam did, but that is hearsay to me.

Q. But doesn't the facts as they exist to-day show you that the channel was changed by a jam; don't you find a great many snags and trees and stumps there?

A. Yes, sir.

Q. So that was changed by a jam that was carried down and changed the whole course of the river years before the boom was ever established?

A. Yes, sir.

Q. Have you ever made any particular investigation or paid particular attention to the draught of steamboats on the river? A. No, sir, not much, but some.

Q. Measured the draught?

A. I have taken the men's word on the steamers.

Q. Your testimony, then, is based on what people say?

A. Yes, sir, and the make of the craft.

Q. But you have not made any examination of the actual draught at any time? A. No, sir.

Q. Don't you know that frequently before that boom was constructed there were drifts and obstructions at the mouth of the river carried down by freshets and lodged there in the shape of jams, the same as the present jam?

A. As I stated before a few snags lodged, but steamers could always go in.

Q. Were not the steamboats prevented from going in?

A. Very little, not like at the present.

Q. How do you know?

A. Because I shipped so much produce on the steamers.

Q. Because you shipped produce?

A. Yes, sir; my living depended on it.

Q. Did you come with your produce?

A. More or less, yes, sir; very often I would ride on the steamers.

Q. Very often? A. Yes, sir.

Q. Do you remember of the big jam that formed in the Nooksack River up about Taus' place several years before the boom was built, so that it was obstructed for months?

A. There was a large jam at Taus' place, just before he went on our place.

Q. That is the one I refer to.

A. That had been there for I do not know how long; for generations for all I know.

Q. And the Nooksack was not navigable for anybody?

A. No, sir.

Q. Was there any boom there? A. No, sir.

Q. It was not a natural but an artificial obstruction?

A. Yes, sir.

Q. And that was formed by snags being brought down and trees and drift?

A. Yes, sir; for unless a jam is started it gets worse.

Q. How far from the mouth of the river was this jam at Taus' that you speak of?

A. About three miles, the lower end of it.

Q. And the water is a good deal deeper there than at the tide flats? A. Yes, sir, but it is narrower.

Q. A good deal narrower? A. Yes, sir.

Q. Do you mean to say the channel of the Nooksack River three miles from its mouth is narrower than the channel it has at the tide lands?

A. No, sir; from where it is below Ferndale at the tide flats you would have a hard job to measure it.

Q. Isn't the channel of the river narrower at low tide than it is three miles from its mouth?

A. I would not say to that, for it varies on the flats.

Q. You have not been at the mouth of the river since November last?

A. I have been down there but I have not examined the jam. I saw the jam at that time and examined it.

Q. Do you know about the time that jam was formed?

A. No, I could not say; it has been forming more or less for the last three or four years; sometimes a jam was in and sometimes it was not. The boom company would open it, and then at a freshet it would come again.

Q. And they have pulled it out several times?

A. Yes, sir, until about a year ago, when they quit work on it and it has been jammed more or less ever since.

Q. But prior to that there was no particular obstruction? A. Only at high water.

Q. Then the boom company set a gang of men at work to remove the obstruction?

A. That is what they did, yes, sir.

Redirect Examination by W. H. Brinker.

Q. Before the boom company removed the obstruc-

tions you speak of, and while they were in process of being removed, could steamboats go up that channel?

A. That is while jammed in the boom?

Q. Yes, sir.

A. No, sir, they could not get up.

Q. How soon after the accumulation of a jam would the boom company commence to open it?

A. Sometimes right away and sometimes it would be two or three weeks before a steamboat could get through, or a month.

Q. Have you ever seen the boom company taking out its logs among the drift?

A. I have seen them working at them.

Q. When they would separate the saw logs from the drift, what would they do with the drift?

A. If it was handy they would turn it out to sea, but a great deal had drifted on the Lummi shore, and you can see it there to-day on the beach.

Witness excused.

D. H. EVANS called.

Direct Examination by W. H. Brinker.

Q. State your name. A. D. H. Evans.

Q. Where do you reside?

A. I live at present on the Lummi Indian Reservation.

Q. What is your business?

A. Teacher of the Indian school.

Q. How long have you lived there?

A. I came there in October, 1891.

Q. Have you been there continuously since?

A. Yes, sir, except the August and September of each year, when I go away.

Q. How far do you live from the mouth of the river, the Nooksack river?

A. About 3-4 of a mile; from a half to 3-4; I never measured it.

Q. Have you been down to the mouth of the river?

A. Yes, sir, many times.

Q. Frequently? A. Yes, sir.

Q. Do you know the situation of the log boom at the mouth of the Nooksack River? A. Yes, sir.

Q. Do you know when this boom was constructed?

A. I do not know.

Q. It was there when you went there?

A. Yes, sir.

Q. What do you know, if anything, about the navigation of the Nooksack River by steamboats?

A. At present?

Q. During any time you have lived there.

A. When I first came the steamers used to go up regularly; in the latter part of 1891 and all of 1892.

Q. How often?

A. We looked for them every week; sometimes they came twice; they didn't always come every week, when they had business elsewhere. The Triumph used to come up regularly, and then the Minnie M. and later the E. D. Smith and other steamers—the May Queen.

Q. Do you know where the channel of the river was as it crossed the tide flats during the days when the boats ran there?

A. I cannot say I know just where the channel was. I have been on the steamers when they came up. Whether there was more than one I cannot say.

Q. You drew this sketch, Plaintiff's Exhibit "B." Can you indicate on that sketch the route the boats came?

A. Yes, sir they came up the bay here and came through the trip up here.

Q. Mark that "A." Just draw a line indicating the route.

A. They came to the Indian village.

Q. Mark that "B." You say you drew this sketch; is that approximately correct?

A. I think so. I drew it right from the schoolroom. This was drawn to send to the Indian Agent. The jam was created so rapidly that we were afraid—

Mr. Newman. I object to any testimony of that kind as incompetent, irrelevant and immaterial, having no bearing on the issues of the case.

Q. Did you draw it? A. Yes, sir.

Q. Is it approximately correct? A. Yes, sir.

Q. This point marked C, what is that?

A. The Indian village.

Q. D is what? A. The jam.

Q. The jam in the Nooksack River?

A. Yes, sir.

Q. How far does that extend down toward the trip?

A. It runs down to it.

Q. How long since the steamboats—first, are steamboats running on that river now?

A. The E. D. Smith has been up there twice that I know of.

Q. In the year 1895?

A. Yes, sir; not up the channel that is marked there, but up what is known as Steamboat slough.

Q. Where is Steamboat slough on this map?

A. Here.

Q. Mark that W. That is Steamboat slough?

A. Yes, sir.

Q. Do you know who was the captain of the steamer when she went up recently?

A. I could not say for sure; I think it was Captain Kilcup.

Q. Before that time how long since there was any traffic on the river by steamboats?

A. I could not say.

Q. Do you remember?

A. Last fall there were two. Yes, and the latter part of 1894, I saw the steamer go up this Steamboat slough, but not up the main channel.

Q. What is the length of the jam from the trip in the boom up the river?

A. I should be safe in saying it is half a mile; between half and three-quarters of a mile.

Q. You were not living there before the boom was constructed? A. No, sir.

Q. Of what is the boom constructed?

A. Pilings.

Q. About how far apart are they driven?

A. I could not say; I never paid any particular attention to it.

Cross-Examination by Mr. Newman.

Q. The present jam is the only serious one since you have been there?

A. The most serious.

Q. The others were cleaned out as soon as possible?

A. The river has been cleared out a number of times since I have been there.

Q. By the boom company?

A. I presume so. I saw the men at work and presumed they were from the boom company.

Q. The boats were running there the latter part of 1894? A. Up Steamboat slough.

Q. And the Minnie M. ran up Steamboat slough?

A. No, sir; the E. D. Smith.

JOHN SLATER called.

Direct Examination by W. H. Brinker.

Q. State your name. A. John Slater.

Q. Where do you reside?

A. Ferndale is the postoffice.

Q. How long have you lived there?

A. For over 20 years.

Q. Are you familiar with the Nooksack River?

A. Yes, sir.

Q. Have you known its condition for navigation during the time you have lived at Fairhaven?

A. Yes, sir.

Q. How far is the Nooksack River navigable from its mouth for steamboats? A. To Lynden.

Q. To Lynden? A. Yes, sir.

Q. Do you know when the Bellingham Bay Boom Company constructed its boom at the mouth of the Nooksack River?

A. I know when they were building it.

Q. Do you remember the year? A. No, sir.

Q. You remember the circumstance?

A. Yes, sir, when they were driving piles.

Q. Before the construction of the boom what was the condition of the river for steamboat navigation?

A. It was good.

Q. At that point? A. Yes, sir.

Q. What obstruction, if any, was there?

A. There was not any.

Q. Since that boom has been constructed, what has been the condition of the river at that point for steam boat navigation?

A. After every high water there has been more or less jam at the boom.

Q. How long would it remain?

A. Sometimes they would get it out right away and sometimes it would take a week or two.

Q. From your observation could you say whether or not the channel of the river, as it passes through the tide

flats towards the waters of the bay, was affected by the presence of the piles of the boom?

Mr. Newman. We object, as no foundation has been laid, the witness not showing any knowledge upon which he could base an opinion.

A. Well, I think the boom would cause it to change, that is, the logs that the boom would cause to stop.

Q. Would the presence of the piles driven along the channel cause the channel to deepen or shoal?

Mr. Newman. Same objection, this witness not having shown knowledge of the channel or location of the same or the piles of the defendant company, or any knowledge of currents, etc.

Q. (Question read.)

A. Caused it to shoal.

Q. This sketch, marked Plaintiff's Exhibit "B"; this is supposed to be up the river; is that sketch about correct as you remember? A. This is steamboat slough?

Q. Yes, sir; if this map is about correct, where did the channel run, as you remember it?

A. From here (indicating) it came down straight and then it came down in a circle and went out to the bay.

Q. Here is Plaintiff's Exhibit "A." State whether or not that sketch is approximately correct or not.

A. That is nearly, I think.

Q. And the channel is marked there?

A. That is about correct; it makes the bend into the shore as it is marked there.

Q. What causes the drift in the river, where does it come from?

A. Well, I think it comes off the banks; it flows in and washes along the banks and causes the timber to float in.

Q. From high water?

A. Yes, sir, and some of the farmers haul some in.

Q. Before the construction of the boom where did the drift go to? A. Out in the bay.

Q. Since its construction, where?

A. Most of it in the boom.

Q. What effect did it have on the channel?

A. It blocked the main channel; that is, the last year it has.

Q. Since the construction of the boom where has it gone?

A. They let some through and some has washed on the shore beyond and some, I suppose, went out.

Q. From your observation, what became of the drift?

A. Most of it is in the boom.

Q. How did the presence of that drift affect the navigation of the boats?

A. It stopped it after every high water until it was taken out.

Q. What is the condition of the water there now?

A. Blocked.

Q. Blocked? A. Yes, sir.

Q. About how long is that jam?

A. I could not say; I judge it is over a quarter of a mile, perhaps more.

Q. How long since the boom company, to your knowledge, have made any effort to remove that jam?

Mr. Newman. We object as incompetent, no foundation having been laid.

Q. (Question read.)

A. I could not say.

Q. When did you last see them at work at it?

Mr. Newman. We object as incompetent.

A. What?

Q. When did you last see them at work at it?

A. I could not say.

Q. Did you ever see them at work there?

A. Yes, sir.

Q. Have you ever gone up the river on steamboats?

A. Yes, sir.

Q. How long since you last went up?

A. I do not know when I did go up last, but I have been up often through both channels.

Q. Ever navigate a boat up the river?

A. Not a steamer, but a little boat I have.

Q. This Steamboat slough, what was that before the construction of the boom?

A. It was a small channel around on the east side of the bay, around by Marietta.

Q. Was it used by the steamboats before the boom was built?

Mr. Newman. We object as incompetent, no foundation having been laid, this witness having shown no knowledge on his part.

A. It was not used to go up the river. They went in to Marietta and backed down and went the other channel unless it was very high tide or very high water.

Q. At what stage of the tide can boats go in now, or could they through that Steamboat slough into the main river?

Mr. Newman. We object, as incompetent.

A. I could not say how it is now, whether they can get through at all or not.

Q. When were you last at the mouth of the river?

A. I passed the boom, but not in a boat, about a month ago, I should say.

Q. Were there any boats there then; steamers?

A. No, sir.

Q. Did you observe the boom? A. Yes, sir.

Q. Did you observe the jam? A. Yes, sir.

Q. Were you on it?

A. No, sir, but I passed by it and it was there all right.

Q. It was there all right? A. Yes, sir.

Cross-Examination by T. G. Newman.

Q. What business are you in? A. Farmer.

Q. How long have you been a farmer?

A. Since I was old enough.

Q. I do not know how old you are.

A. I am 30 years old.

Q. How long have you lived in Whatcom County?

A. About 29 years, I think.

Q. Where during that time?

A. In Whatcom and Ferndale.

Q. You live at Ferndale now?

A. Yes, sir, on a ranch near Ferndale.

Q. How long have you lived on the ranch?

A. Over 20 years.

Q. How have you acquired an intimate knowledge relative to the channels of the Nooksack River?

A. Passing through it in a canoe.

Q. Have you frequently passed up and down?

A. Yes, sir.

Q. How frequently have you passed through it with a canoe during the least year?

A. Not any.

Q. Not any during the least year? A. No, sir.

Q. Isn't it a fact that your knowledge of the mouth of the Nooksack River was principally acquired prior to the construction of the boom, when you used that river more than you do now? A. Yes, sir.

Q. You used to do most of your traffic up the Nooksack River? A. Yes, sir.

Q. Now you have a first-class wagon road and a bridge over the Nooksack River, connecting your ranch with New Whatcom? A. Yes, sir.

Q. Have you made any soundings of the Nooksack River relative to the channel of the mouth thereof at any time since the defendant's boom was located there?

A. Any soundings?

Q. Yes, sir, as to the depth of the water.

A. I have been there with boats, but I never noticed the depth.

Q. You do not claim to be a navigator?

A. No, sir.

Q. And most you have testified to you testified to with out having made any examination?

A. I have passed several times up and down there.

Q. And you never investigated as to how the channels of the river were changing?

A. If the channel changed I would know it.

Q. You would know the variations of the channel out on the tide flats?

A. If I went down at low tide.

Q. You didn't go down at low tide?

A. I tried to strike a high tide.

Q. The fact is you never could get in or out except on the tide?

A. You could without a high tide; on a half tide.

Q. With a steamboat? A. Yes, sir.

Q. With a steamboat drawing how many feet of water? A. When drawing four feet.

Q. On half a tide? A. Yes, sir.

Q. When?

A. Before the boom was constructed.

Q. What year?

A. Five or six or seven years ago.

Q. Six or seven years ago? A. Yes, sir.

Q. Do you know any thing about the depth of the channel since the boom was constructed?

A. Since the first time?

Q. Yes, sir.

A. It is not as deep as it used to be.

Q. How do you know?

A. Because the boats didn't get up and down so good.

Q. What do you mean?

A. They stuck on the bar.

Q. Didn't they stick on the bar before the boom was there? A. Very seldom.

Q. Have you spent much time about that boom or the mouth of the Nooksack River? A. No, sir.

Q. Did you before the boom was constructed?

A. No more than I could help.

Q. Your business didn't call you there?

A. I passed there often.

Q. You passed more in past years than now?

A. Yes, sir.

Q. Because you now have a good plank road?

A. Yes, sir.

Q. What do you know of the business of the boom company in clearing this drift out?

A. They tried to get it out.

Q. You testified that most of the drift was there yet?

A. Yes, sir.

Q. How do you know about the amount of drift the boom company put out? A. I do not know.

Q. You were not there for any length of time, up near the mouth of that drift? A. No, sir.

Q. Then how can you testify that most of the drift remained there? A. It is full.

Q. But you do not know how much they turned out?

A. No, sir.

Q. Then you do not know whether or not they have turned out more drift than they have left in?

A. I do not know, but I think they have.

Q. You make that guess? A. Yes, sir.

Q. That is considerably like most of your testimony?

A. No, sir.

Q. Is it not? A. No, sir.

Witness excused.

Mr. Brinker. We offer in evidence Plaintiff's Exhibits

"A" and "B." It is stipulated and agreed that the signatures of the witnesses to the respective depositions are waived.

Mr. Brinker. We rest.

DEFENDANT'S CASE.

ALBERT MOHRMANN called.

Direct Examination by Mr. Newman.

Q. What is your age? A. 48.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. Where do you reside? A. At Marietta.

Q. Is that what is commonly called Lummi?

A. Yes, sir.

Q. Where is that town located?

A. At the mouth of the Nooksack River.

Q. In this county and State? A. Yes, sir.

Q. How long have you resided there?

A. For six (6) years at Marietta.

Q. How long in Whatcom county?

A. Twenty-five years.

Q. Where did you reside prior to residing at Marietta?

A. On a piece of land now in Whatcom; I have never been out of Whatcom county more than five months in 25 years.

Q. Where did you reside before going to Marietta?

A. At Port Townsend.

Q. Where did you live before you moved to Marietta?

A. At Port Townsend.

Q. You said you resided in Whatcom county 25 years?

A. I was off and on in Whatcom, but never away more than five months.

Q. Were you living in Whatcom? A. Yes, sir.

Q. Before you moved to Marietta you lived in Whatcom? A. Not quite.

Q. Where did you reside when at home?

A. On section 34, near Lummi.

Q. Was it near Lummi? A. Yes, sir.

Q. How near?

A. About three miles from the mouth of the river.

Q. Up the river or this side?

A. Up the river.

Q. Then you have practically made your home near the Nooksack River for the last 25 years?

A. Yes, sir.

Q. Excepting when absent on business?

A. Yes, sir.

Q. Have you ever followed the sea as a sailor?

A. Yes, sir.

Q. State what experience you have had in that capacity.

A. I sailed when I was 14 until I was 22, when I landed at Bellingham Bay.

Q. You followed the sea all that time?

A. Yes, sir.

Q. Have you ever had any experience on the tide waters of Puget Sound?

A. Yes, sir; I ran a mail boat from Port Townsend to all these points among the islands and to Whatcom.

Q. Did you ever go to Seattle?

A. Yes, sir, in small boats.

Q. Steamers?

A. I was running on a little boat, and besides I have been up and down on sloops.

Q. How long did you run the mail boat?

A. I think it was about nine months.

Q. Are you acquainted with the Nooksack River?

A. Yes, sir.

Q. How long have you been acquainted with that stream?

A. Ever since I first settled here in 1870.

Q. In going to and from your home up the river at that time, did you frequently travel by way of the river?

A. Yes, sir, a good deal.

Q. Are you acquainted with the mouth of the river?

A. Yes, sir.

Q. The general nature of the mouth as to bars and any obstructions that may have existed there in past years? A. Yes, sir.

Q. During the six years you have resided at Marietta was your home so situated that you could constantly see the mouth of the river? A. Yes, sir.

Q. You could see all traffic by way of steamboats that was carried on up or down that river for six years?

A. Yes, sir.

Q. What official position do you hold now?

A. Postmaster.

Q. How long have you occupied that position?

A. It is a year ago last October.

Q. Any other business are you engaged in?

A. Not particularly; hotel-keeping.

Q. You have a tavern? A. Yes, sir.

Q. How long have you had a tavern?

A. Six years.

Q. State whether or not prior to the construction of the boom by the defendant company there were any obstructions at different times at the mouth of the Nooksack River, occasioned by snags, brush, and drift carried down that river, or occasioned by shallow water at its mouth.

A. There has always been obstructions in the mouth of the river, and before you got to the mouth across the flats. Never a boat could get in, except at high water.

Q. Then boats have never been able to get up and down, except on high tides?

A. No, sir; a boat that draws one foot of water could go on half tide, but a four foot boat would have to wait.

Q. Can boats drawing four feet navigate that river?

A. Only at high freshets.

Q. Was that so prior to the building of the boom?

A. Yes, sir.

Q. Is that so at this time? A. Yes, sir.

Q. Prior to the building of defendant's boom, did boats experience any difficulty in going in and out of the mouth of the river by reason of jams of brush and snags and trees? A. Yes, sir.

Q. State what you personally know about such obstructions.

A. I have been employed by the captain of the Fanny Lake to get out logs to enable him to get up.

Q. Where were those logs?

A. At the mouth of the river and up. Clark and I were both employed.

Q. Go on and state about any obstructions occasioned by brush.

A. Since the boom company went in it cut it away, but before that the captains had to hire their own help. At certain occasions there were always jams.

Q. Occasioned by high water? A. Yes, sir.

Q. Were these jams just as frequent before the boom was constructed as after? A. Yes, sir.

Q. Of the same nature? A. Yes, sir.

Q. Have you frequently seen steamers delayed prior to the boom being there.

Mr. Brinker. We object, as leading.

Q. State whether or not, prior to the construction of the boom, you have seen steamboats obstructed by drift at the mouth of the river, either going up or coming down.

Mr. Brinker. We object, as leading; let him state what he has seen.

A. Yes, sir; I have gone down the river and got to the mouth and have had to walk to New Whatcom on account of drift being there; I walked from Clark's place.

Q. Was that an unusual occurrence?

A. It happened me twice.

Q. Was it unusual at that time for boats to be delayed from one to three days from getting up the river?

A. No, sir, it was not unusual.

Q. State whether or not jams were formed up the river above its mouth on account of drift being jammed in the river

Mr. Brinker. Same objection.

Q. State what you know about any obstruction from jams up the river. A. When?

Q Prior to the boom being built.

A. There was a jam ¾ of a mile down the river from Taus' place, and we cut it out. It was in 1874 we cut it out and no steamboat or anything could get up previous to that.

Q. Do you know how long that jam was in there?

A. It was there when I came into the country, and stayed there until we cut it out.

Q. A number of years? A. Yes, sir.

Q Where is Taus' place situated?

A. About a mile and a half towards the mouth of the river.

Q. On which side of the river?

A. On the right-hand side coming from Ferndale to the mouth of the river.

Q. Above or below Ferndale?

A. Below Ferndale.

Q. And you say before that was cut away no steamboats could go up or down the river? A. No, sir.

Q. Was that occasioned by any boom being built?

A. No.

Q. Do you know, generally, as to the amount of traffic that has been conducted up and down the Nooksack River by steamers since that jam was taken out at Taus' place?

A. The steamboats used to go up after it was taken out.

Q. What amount of business has been conducted on the river by steamboats?

A. In 1870 that was about when the first settlers came, and it increased as they came in and continued until the wagon roads were made and I went on the first wagon to Ferndale and on the first steamer.

Q. From where on the first wagon?

A. From New Whatcom.

Q. When was the first wagon through?

A. It was about in 1884.

Q. In 1884? A. Yes, sir.

Q. Since that time has the connection by road between Ferndale and Lynden with New Whatcom been improved?

A. I do not know anything about Lynden.

Q. Well, Ferndale; have they a good wagon road there now? A Yes, sir.

Q How is most of the produce of the Nooksack River Valley brought in?

A. By railroad and wagon.

Q. Do you know whether or not there is any considerable demand for steamboat traffic by people on the Nooksack River at this time?

A. Not near as much as before the wagon roads were

constructed. There is not the need for boats that there was before the wagon road.

Q. From your knowledge of the depth of the water at the mouth of the Nooksack River at any time within the last 25 years, has there been sufficient water at the mouth of said river to permit of the passage of steamers drawing seven feet of water?

A. Never. It might be at the highest time of the river and when the tide was very high. We have had the tide twice in the last 25 years that it could be done.

Q. Have you ever known a steamer going up that drew that amount of water? A. No, sir.

Q. Do you know the Washington?

A. Yes, sir.

Q. Did she ever go up the river?

A. No, sir, never.

Q. Where have you seen that steamer?

A. At McDonald's wharf, at Marietta.

Q. Have you ever seen her more than once?

A. No, sir.

Q. Could she have gone up that river and conducted business without your knowing it?

A. No, sir.

Q. Are you acquainted at all with the logging industry that has been carried on on the Nooksack River?

Mr. Brinker. We object to any testimony as to the logging industry, as incompetent, irrelevant, and immaterial.

A. No, not much. I have seen the amount of timber that has come down since the boom was built.

Q. From your knowledge of the traffic conducted on the river by steamers and your knowledge of the amount of timber coming down, what is the river, in your judgment, more valuable for; as an outlet for timber or for navigation by water craft?

Mr. Brinker. Same objection.

A. Since the boom was built it seems to me there has been more money spent and more of any industry in timber than steamboats that have gone up and down the river.

Q. State whether or not steamboats have any difficulty in navigating the river above its mouth at low water in the river. A. How far up?

Q. Up to Lynden.

A. Oh, yes, sir. They used to get to Taus' and they had a landing there and they could not often get further.

Q. Why not?

A. On account of shallow water.

Q. Do you know a boat known as the Monroe?

A. Yes, sir.

Q. Was that a large boat or a small boat?

A. A boat when loaded of about four foot draught.

Q. Did she make many trips up the Nooksack River?

A. Yes, sir.

Q. What time, do you recollect?

A. Ten years ago and previous to that, and perhaps after.

Q. Do you know whether or not she experienced difficulty in navigating the water on account of her deep draught?

A. In her length as much as her draught. I came down in her and she had to come down stern first.

Q. From what point did she come down in that way?

A. From Ferndale. When I got married my wife and I came down in that.

Q. There was not room enough for the boat to turn around on account of the narrowness of the river?

A. Yes, sir.

Q. Do you know M. J. Clark, who lives near the mouth of the river? A. Yes, sir.

Q. Are you acquainted with his general reputation for truth and veracity in the community in which he lives? A. I am.

Q. State whether or not it is good or bad.

A. It is not good; it is bad.

Q. Would you believe him under oath? A. No, sir.

Mr. Brinker. I object, as improper, and move to strike out the answer

Cross-Examination by Mr. Brinker.

Q. Are you a stockholder in the Bellingham Bay Boom Company? A. No, sir.

Q. Are you in its employ? A No, sir.

Q. Ever been? A No, sir

Q. What interest have you in the result of this suit?

A. None; my own private affair; that channel used to go on our side and if the water was to be blocked up entirely it would be bad. Whenever it is blocked up it has to cut through somewhere, and this place where it runs through the boom I think it was helped by parties turning in logs. Years ago we used to carry the mail to

Lummi on foot, and when it got blocked it had to force its way, and there have been two sloughs cut that the county had to put two bridges there.

Q. What interest have you in this suit?

A None.

Q. The slough that runs by your place is Steamboat slough?

A. It was the only mouth of the river.

Q. What stopped that up? A The drift

Q. Then the channel was cut out straight to the deep water?

A. No, sir; there had to be two bridges built.

Q. You stated some one turned in logs; who turned them in there?

A. I do not know. I used to go up and down the river in a small boat—

Q. Never mind that. Now you say you have known that river for 25 years. A. Yes, sir.

Q. And that the drift—has there been drift going down that river all that time?

A. Yes, sir; at every high water drift goes down.

A. At the mouth of the river.

Q. Deposited at the mouth of the river?

A. Yes, sir.

Q. Before this boom was erected?

A. Yes, sir.

Q. Then the boom company cleared that all out?

A. After the boom company came there they had men to clear it out.

Q. Before the boom company built their boom the mouth of this river was covered with drift?

A. At times.

Q. Did the boom company, when they came, remove that drift before they put in their boom?

A. Yes, sir.

Q. And took it all out? A. Yes, sir.

Q. And sent it out to sea?

A. I do not know that, because I was not there. I will have to tell that the parties who lived next to me that they said that sometimes in the middle of the night they would have to go out and clear the drift away.

Mr. Brinker. I move to strike out the answer as not responsive to the question and hearsay.

Q. Now how many times were you present before these piles were driven there by the boom company when that company was removing that drift?

A. I have never been present when they were removing it, because I live on this side of the bay and the boom is on the other side.

Q. Then of your own knowledge you do not know whether the Bellingham Bay Boom Company found drift in the channel of the river and removed it before they put in their boom or not? A. What?

Q. (Question read.)

A. Well, only by seeing that the boat had to stop until the drift was removed. I was not there to see. No.

Q. Were you there when the boom company first began to drive their piles? A. Yes, sir.

Q. How long did you remain there?

A. Where I live?

Q. No; where they were driving piles.

A. No, sir; I was not there only on occasions. I could see them work.

Q. Did you see them when they began.

A. Yes, sir.

Q. Saw them every day? A. Yes, sir.

Q. Could you see whether there was drift in the river from your place? A. No, sir.

Q. How far did you live from them?

A. About a mile or three-quarters.

Q. You say that for years before the boom was constructed drift accumulated there at the mouth of the river and obstructed navigation? A. Yes, sir.

Q. About how long would the jam be in the Nooksack River?

A. I was not there to see, only that when a boat came up it took so much time to get through; I never was there to examine how much of a jam was there.

Q. How often did you ever see the boats delayed?

A. I never could keep track of it, it was so often.

Q. Every trip?

A. Oh, no, sir, no, sir; but after a freshet there was a jam.

Q. How long at any time was a boat delayed?

A. I have seen them turn back and not go up.

Q. Why? A. On account of the drift.

Q. Were you present so you see it was the drift that prevented passage? A. No, sir, oh, no.

Q. Why do you say it was the drift?

A. I heard the captain say so.

Mr. Brinker. I move to strike out the answers of the

witness relative to the drift preventing boats to enter the river as hearsay.

Q. Have you ever seen a boat stop there before this boom was put in and afterwards get into the river and go on its way?

A. I have seen lots of boats stop at times before the boom was put in.

Q. How long would they stop?

A. I didn't keep track of it. I didn't take particular notice in order to see that a steamer was trying to back to get into the river.

Q. Could you tell how long they were delayed?

A. As I said before, I have seen a boat turn back and sometimes they would be belated quite a time; a day sometimes. They have to watch for the tide on the flats.

Q. They had to wait for a tide under all circumstances, didn't they, to get into the river?

A. Yes, sir.

Q. Because there is a bar?

A. There never was a channel across the flats at low water, even in very small boats.

Q. That was on account of the bar? A. Yes, sir.

Q. Did the water spread right out on the flats?

A. Yes, sir.

Q. And was the same depth all over the flats?

A. Yes, sir.

Q. Where was the bar you speak of?

A. I say the mud flats.

Q. The mud flats was the bar? A. Yes, sir.

Q. There was no channel with a bar at the outer end of it?

A. After you get into the mouth of the river. The mouth is at Clark's, and out of that the mud flats never had a channel.

Q. So a boat might have been waiting for high tide?

A. Yes, sir, or drifts. After they got outside of the tide, they would get to the drift. On the flats they used to get stopped, but when they got up over the flats they could go to Taus'.

Q. They were delayed by drift?

A. Yes, sir, and the tide on the mud flats.

Q. Were you present to see what delayed them?

A. Yes, sir.

Q. How often?

A. Twice coming down the river myself, but at other times I saw them delayed and by hearsay that they had to cut their way through.

Q. But you were only there twice yourself?

A. Yes, sir.

Q. At what time were you there; what year was it?

A. It was on the old steamer Edith R. and it is about fourteen years ago.

Q. Have you ever been up or down on a steamer since the boom was put in? A. Yes, sir.

Q. Were you delayed? A. No, sir.

Q. No drift there then? A No, sir.

Q. That jam at Taus' place was in a bend of the river?

A. It blocked the river; it sloped from one side to the other.

Q. It was right in a bend?

A. The full river was blocked.

Q. What caused that? A. Drift.

Q. What stopped the drift there?

A. I do not know; it was there when I came; there were long trees and we had to cut them.

Q. It was narrow there?

A. The same as it was other places.

Q. Has there been a jam there since the boom was put in? A. No, sir.

Q. Drift has still come down? A. Yes, sir.

Q. Have you observed the channel across the mud flats where the boom crosses the channel where the row of piles crosses the channel?

A. I have been over there only three or four times since the boom started.

Q. Do you know where they have a trip between the piles? A. Yes, sir.

Q. Is that trip about across the channel at its deepest point?

A. No, sir, it is on the side, as I recollect, to let the steamers in.

Q. Where is the deepest water?

A. The deepest water is right—I never sounded it.

Q. Can you tell from any observation that you have made whether the presence of these piles has shoaled the water?

A. I know it has deepened it, because they tried to go on our side and had to turn back and go the boom way.

Q. And the piles have deepened it?

A. Yes, sir, because the steamboats had to delay trying to get up the old way, and they could not make it.

Q. How close together are those piles driven?

A. In some places right beside each other.

Q. What do you mean?

A. They are right close to one another; a kind of break water.

Q. Joining each other; touching each other?

A. I could not state.

Q. Within a few inches of each other?

A. Within a foot.

Q. How far does that extend where they are driven so close together?

A. It is a very little place. It looks like a place for boats to go behind and stop.

Q. How long is it? A. Sixty feet.

Q. How far are the piles apart? A. 25 or 20 feet.

Q. How wide is that trip you spoke of?

A. As I recollect, it is a boom stick 70 feet long.

Q. Have you ever had any experience in driving piles?

A. No, sir.

Q. Have you ever observed the condition of the river after they were driven as to whether the water shoaled or deepened? A. No, sir, I never examined it.

Q. Is the mud or sand shifting with the different freshets? A. The mud is always shifting.

Q. If you drove a pile, would not this mud accumulate around that pile? A. I do not know.

Q. Or would the water wash it out deeper because the pile was there? A. One pile?

Q. Any number of piles.

A. If a number of piles were driven together it is bound to deepen the water.

Q. Was that the result up there? A. Yes, sir.

Q. So, then, the presence of that boom has deepened the channel across the flats according to your idea?

A. Yes, sir, right where the boom is.

Q. The water is deeper than it ever was?

A. Yes, sir.

Q. At the time the Monroe backed down, it was because she was too long? A. She always did that.

Q. It was not on account of lack of water?

A. No, sir.

Q. But because the river was too narrow?

A. Yes, sir. The bends are so narrow and he drags his chains as he does not want to come down too quick.

Q. Have you been out there recently?

A. No, sir.

Q. How long since you were at the mouth of the river?

A. About four months ago.

Q. Was there a jam there then?

A. I didn't look at the jam; I went fishing; I went up the old channel.

Q. Did you go to the river? A. Yes, sir.

Q. Did you see a jam?

A. No, sir, I went up the old channel with my boat fishing.

Q. What channel do you speak of now?

A. McDonald's or Steamboat slough; the old channel. No steamboat ever went the other way until the boom cut through that channel.

Q. What is your feeling towards Mr. Clark?

A. Like I feel towards any other man.

Q. Have you ever had any difficulty with him?

A. No, sir.

Q. You say his general reputation for truth and veracity in the community in which he resides is bad?

A. His reputation is that he tells more fibs than the truth.

Q. What do understand by general reputation?

A. My neighbor's opinion.

Q. What the people say of him?

A. From my own experience. I talk from my own experience. I cannot believe him under oath, and I hear they cannot believe him.

Q. You understand that by his general reputation is meant what people say of him? A. Yes, sir.

Q. Whom did you ever hear say that Mr. Clark would not tell the truth?

A. Well, there are several parties; do you want the names?

Q. Yes, sir. A. Captain Matthews.

Q. Where does he live? A. At Marietta.

Q. What does he do?

A. He does a little of everything; he is an old man; very old.

Q. What does he say?

A. That he could not believe him.

Q. How did he happen to say it?

A. In general talk. He had a trade with him and could not depend on him.

Q. Was he telling you the circumstances of the trade?

A. No, sir.

Q. How did he happen to make that remark?

A. As we get together and talk we discuss people.

Q. Who else did you hear say anything?

A. Mr. Smith.

Q. Where does he reside? A. Lummi.

Q. What did he say?

A. That he didn't believe him and would not make a trade unless the money was put up.

Q. Did Captain Matthews or Mr. Smith ever have any difficulty with Mr. Clark?

A. I do not think they did.

Q. Who else did you hear say anything about his veracity? A. That is all and myself.

Q. I believe you said you had no difficulty with him?

A. No, sir.

Q. Did you ever have a trade with him?

A. No.

Q. Did he ever lie to you about anything?

A. Yes, sir, more than twenty times.

Q. What about?

A. When a man has an old scrub horse and says that horse has such a record and tells me about it, I know he lies.

Q. Ever traded horses with him?

A. No, sir, he could not trade anything with me, Clark could not.

Q. He could not trade horses with you?

A. No, sir.

Q. You were anxious to get a horse with a record?

A. No, sir. He wanted to trade. I was not anxious to trade, and I didn't trade.

Q. How did you discover he lied about the record of the horse? A. I knew the horse.

Q. Do you know whether he knew it or not?

A. Well, I do not know as I do, but I think I do. I feel convinced he did.

Q. So far as you know, he might have been imposed on?

A. Maybe; I said I would not believe him on oath.

Q. You might not believe anyone?

A. No, sir, no, sir.

Q. Have you any other instance in which Clark lied to you? A. No, sir.

Witness excused.

FRANK VAN DE MARK called.

Direct Examination by Mr. Newman.

Q. What is your age? A. Twenty-six.

Q. Where do you reside?

A. I reside at Ferndale at this time.

Q. What business are you engaged in?

A. Fishing.

Q. On what waters? A. Nooksack River.

Q. How long have you resided in Whatcom county?

A. In Whatcom county since 1888.

Q. What business were you first engaged in?

A. Pile driving and bridging.

Q. For whom?

A. For the Fairhaven Land Company

Q. Are you acquainted with the Nooksack River?

A. Yes, sir.

Q. How long have you been acquainted with that river? A. Since 1889.

Q. Are you acquainted with the mouth of the river?

A. Yes, sir.

Q. How far up the river have you been?

A. As far as Ferndale.

Q. Are you thoroughly acquainted with that stream from Ferndale clear to its mouth? A. Yes, sir.

Q. All of it? A. Yes, sir.

Q. Do you know where the boom of the defendant is located, the Bellingham Bay Boom Company?

A. Yes, sir.

Q. Do you know when that boom was constructed?

A. I think it was constructed in 1889.

Q. What do you know about the construction of that boom; your personal knowledge?

A. I worked about two months driving piling for the boom company.

Q. On what driver?

A. On the Fairhaven Land Company's driver.

Q. The driver was engaged by the boom company to construct its boom? A. Yes, sir.

Q. Do you recollect when you commenced work?

A. No, sir, not the exact date, but I think it was in June.

Q. Of what year?

A. In 1889, I think; I am not certain about that, but I think it was that year.

Q. Have you any way of refreshing your memory as to whether it was 1889 or 1890?

A. No, I would not be certain. It possibly might have been in 1890.

Q. Do you remember when the bridge was constructed on the Great Northern Railway over the Nooksack river at Ferndale?

A. I think it was in 1889; it seems to me it was in 1889; it might have been 1890.

Q. At least you can remember the month when you commenced to work? A. I commenced in June.

Q. In June? A. Yes, sir.

Q. What part of June?

A. I think somewhere about the middle of June.

Q. How long did you work in the construction and with the driving of piles? A. About two months.

Q. Then, to the best of your recollection, it extended from the middle of June to the middle of August?

A. Yes, sir.

Q. Explain just the nature of the work you did.

A. Well, in what shape?

Q. How was your pile driver arranged?

A. The same as all pile-drivers; it was steam.

Q. Was the pile-driver on a scow? A. Yes, sir.

Q. And it floated from point to point?

A. Yes, sir.

Q. Examine that map, the plat purporting to be the map of the Bellingham Bay Boom Company's grounds, marked Defendant's Exhibit "1," and state whether or not in your judgment that is a reasonably correct plat of

the location of defendant's boom and the condition of the mouth of the river at and about the boom at extreme low tide.

A. I believe that to be an exact map of the way the river is at the present time; the way the boom is.

Q. The way the boom is? A. Yes, sir.

Q. How about that being a correct map of the condition of things at the time you constructed the boom?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir, that is correct as near as I can tell.

Q. Indicate, if you please, as to what work you did and where the piles are that you drove from this map.

A. I drove from this end here—that is, the lower end on the right-hand side, and drove this pocket in this line here up to the Lummi side of the river, and from the center of the boom back connecting with the pocket.

Q. From the center of the boom you indicate a point about half way down from the old channel, called Steamboat slough?

A. Yes, sir, to the lower end of the piling.

Q. During the two months you worked there did you become familiar with the channel of the river and with the tides and depth of water at low and high tide?

A. Yes, sir.

Q. At that time there were steamboats going up and down the river? A. Very few.

Q. Very few? A. Yes, sir.

Q. From the knowledge you gained at that time and the knowledge subsequently acquired by you, what, in

your judgment, is the deepest draught boat that could navigate the river at its mouth?

Mr. Brinker. We object, as the witness has not qualified himself to give an opinion.

A. Four (4) feet; a boat drawing four feet might be able to navigate at extreme high tide.

Q. Have you, during your residence in the county and your residence on the Nooksack River, seen boats passing up and down the river? A. Yes, sir.

Q. Covering what period of time?

A. In 1890 and 1892; also in 1893 there were boats up and down. In 1894 there was very little travel; that is, last winter.

Q. How about 1895?

A. This year I have only seen a boat go up twice.

Q. What was your opportunity of seeing?

A. I live right on the river and would have known it if there had any gone up or down.

Q. Where do you live?

A. A mile and a half below Ferndale.

Q. How long have you lived there?

A. Since September last.

Q. Have you ever lived near the mouth?

A. Yes, sir.

Q. For what length of time and when?

A. From June, 1893, until last July.

Q. What year? A. Up to 1894 in July.

Q. From June, 1893, to July, 1894? A. Yes, sir.

Q. What were you doing there at that time?

A. I was getting off logs there and working for the boom company part of the time.

Q. In what capacity? A. As foreman.

Q. For about a year?

A. Yes, sir, about that time.

Q. During that time was there any serious jam of logs or drift at the mouth of the river?

A. Yes, sir, we had one during that time.

Q. What was done, if anything, to remove that jam?

A. The company had me put men there and clear it off. I worked there about five weeks.

Q. Did you clear it out thoroughly so as to open up the channel to steamboats? A. Yes, sir.

Q. You were laboring there for five weeks with a gang of men? A. Yes, sir.

Q. What did you do with the brush?

A. Anything that would float we sent adrift into the bay.

Q. How did you get it into the bay?

A. We had an engine on a scow and had a wire cable and would pull it out of the channel, and when the tide raised we pushed it out as far as we could.

Q. Indicate the point where you put that drift out.

A. It came through the trip.

Q. The trip marked "FG"?

A. Yes, sir. Some small parts went down through there. I presume a quarter between those two rows of piles where the channel is, but most of it went through the trip and went over the flats into the bay.

Q. That was an extensive jam? A. Yes, sir.

Q. Did you observe the formation of that jam?

A. Yes, sir.

Q. There when it formed? A. Yes, sir.

Q. What was the occasion of that jam forming there and how did it form?

A. It started in a freshet and the first log that stopped was a large cottonwood, and it came down, and as there was a heavy sea and the tide just coming in, there was not enough water to float it.

Q. Indicate, as near as you can, the place where that cottonwood stopped.

A. It stopped just about there.

Q. At about a point midway between the line of Miller's boom and the outer line of piling of defendant's boom at about the figures 178? A. Yes, sir.

Q. What caused it to stop there?

A. A sand bar, and of course as soon as that stopped the snags that came down lodged on it.

Q. Did that cottonwood stop by coming in contact with any of the piles or boom sticks of the defendant company?

A. No, sir, there were no piles within 500 yards of it.

Q. State whether or not the piles and boom sticks indicated on this map as Miller's boom are now located as indicated here, or have they been removed?

A. Most of them have been removed. There are some down on this point that are still there, but the most of them are removed.

Q. Were they removed at the time you speak of?

A. Yes, sir.

Q. Describe that large cottonwood which first caught and created the jam referred to by you.

A. It was about 300 feet long—250 or 300; it was a

very long one. And I judge it was three or four feet through and it had caved in from the banks and it had the roots on.

Q. Any limbs? A. Yes, sir.

Q. How far out would the limbs reach?

A. They were broken off, a great many of them, and those left on were 10 or 12 feet long.

Q. Was that jam occasioned by reason of any of the piles or boom sticks of the defendant company?

A. No, sir, it could not possibly be.

Q. Would that jam have formed there if there had been no boom there?

A. I do not see what could have hindered it; there were no piles or boom sticks. It undoubtedly would have.

Q. How did you remove that jam during the five weeks you were there?

A. We had a large scow with an engine on it and had a wire cable and all we could put in the water we would float, and that would not float we put on the flats and would roll them over each other out of the channel.

Q. Did you use any powder?

A. Yes, sir, on the large cottonwood.

Q. What sort of powder?

A. Giant powder.

Q. Much of it?

A. Yes, sir, considerable, but how much I do not know; we took over considerable boats of it.

Q. During the time you were employed from June, 1893, to July, 1894, did you attend the trip?

A. Yes, sir.

Q. Were you constantly in attendance at the trip?

A. Yes, sir.

Q. Except the jam spoken of by you and removed by you, was there any other impediment to navigation during the year referred to? A. No, sir.

Q. Were there any boats passing up and down the river through the trip and boom? A. Yes, sir.

Q. Did they have any trouble in passing through the boom?

A. None whatever, until this jam formed.

Q. Did trees, such as described by you of 250 and 300 feet in length, frequently come down that river with the drift?

A. Yes, sir, you can see them at any high freshet.

Q. When were you last at the mouth of the river?

A. I think it was about a month ago; just about a month ago. Somewhere near a month ago.

Q. Did you observe the jam of logs in the mouth of the river, or rather the jam of logs and drift?

A. Yes, sir.

Q. Ever been out over that jam? A. Yes, sir.

Q. Are you acquainted with its character and nature?

A. Yes, sir.

Q. State whether or not that jam and the drift and trees and stumps contained in was stopped there by the beams or piling of the defendant company.

A. No, sir; as I said before the jam I took out and the jam there now was stopped in the same place. And this jam stops right there and is about 500 yards from the piling up to where the jam starts to form. Right here.

Q. Indicate the lower line of piling in the Miller boom.

A. It is here.

Q. Was there and is there at this time open water between the outer line of piles and boom sticks of defendant company's boom and the jam which is in there at this time?

Mr. Brinker. We object, as leading.

A. In some places there is open water; in others there is not. In pulling out that other jam I pulled the heavy snags from the channel of the river. These piles here are not driven in the channel of the river. They are driven 150 feet back. I pulled those snags out and pulled them against this line of piling and there is no open water there.

Q. Is that drift or jam in there now caused by the drift coming against the outer line of piling of the defendant company? A. No, sir.

Q. That drift that is there now is not stopped and was not stopped by the piles of the defendant?

A. No, sir. but by this bar right here. This bar starts there and runs off over the flats.

Q. Are you generally acquainted with the amount of timber that has come down the river since the boom was constructed?

A. Yes, sir, from looking at it. I could not give the exact figures, but I have watched it.

Q. From your knowledge of the business conducted on that river by steamboats and your knowledge of the timber products that have floated down that river, in your judgment, what is the river most valuable for; the navigation of boats or the floating of saw logs?

Mr. Brinker. We object as incompetent and immaterial.

A. There is very little traffic on the river; in fact, very little freight has been brought down there during the last six years. But I have seen a great many logs come down the river, numbers of million of feet, and I judge that the lumbering was of more importance than steamboat traffic

Cross-Examination by Mr. Brinker.

Q. You say that the first jam you noticed there was caused by the lodgment of a cottonwood tree?

A. Yes, sir.

Q. You saw it? A. Yes, sir.

Q. What were you doing?

A. Pulling off logs on the flats and working a short distance below.

Q. How much of a jam formed above that tree?

A. It must have been at least a quarter of a mile long

Q. How long did it remain there?

A. At the end of five weeks we had it out.

Q. Why didn't you remove that tree as soon as it lodged?

A. The river was too swift and the water too high, and we had to wait for high water to move the scow, and by that time there was more drift.

Q. How often do the tides flow?

A. Two tides every twenty-four hours.

Q. And how long was it before the time the tree lodged until you could get it?

A. This cottonwood tree came down shortly after din

ner and we could not get at it until high tide the next morning at seven o'clock.

Q. Did you go then and attempt to get it out?

A. No, sir.

Q. How long after that tree lodged before you commenced to work on the jam?

A. A day and a half.

Q. And it had accumulated for a quarter of a mile?

A. Yes, sir.

Q. You were in the employ of the defendant company all the time you were there?

A. No, sir, I was not.

Q. In whose employ were you?

A. When I started in I started taking off logs by the thousand.

Q. For whom?

A. The boom company paid me so much, with the understanding that I look after the boom and the trip, but of course I was working for myself and had my own men for the logs, and when this jam formed there I told the company and they employed me to remove it.

Q. You were working for the company when taking off the logs? A. Yes, sir.

Q. Have you any interest in the company now?

A. No, sir.

Q. Are you in its employ now? A. No, sir.

Q. Do you know anything about the condition of that river before the boom was put in there?

A. No, sir.

Q. Had you ever navigated it before the boom was put in?

A. No, sir; that was my first experience when I commenced to drive piles.

Q. When you commenced to drive piles where was the steamboat channel?

A. They used to go through Steamboat slough.

Q. Was not Steamboat slough stopped up before that where it leaves the river?

A. We called it the old channel.

Q. Was that not stopped up?

A. To a certain extent, but there was room enough for a boat to get through at high tide.

Q. Did any boats go up through the channel along which you were driving piles? A. Yes, sir.

Q. Where was the deepest water?

A. This row of piles starting from here started on the channel. The channel ran something like that and curved and went down and came out here through the trip on the flats, and there was also another small channel in a southern direction between the two lines of piles, and there was more water in this channel through the trip than anywhere else.

Q. Did any boats go through the trip and up this straight channel while you were driving piles?

A. Yes, sir, there was.

Q. You say you were attending to the trip?

A. Yes, sir.

Q. For how long?

A. From June, 1893, to July, 1894.

Q. Were boats delayed at any time on account of the trip being closed? A. No, sir.

Q. Did you remain there all the time?

A. No, sir, but my house was near it, and as soon as I heard the whistle I could get out in time to open it.

Q. How far did you live from the trip?

A. About a quarter of a mile.

Q. You would get there and have it opened by the time they reached it?

A. Yes, sir. They would whistle out on the flats and I could get out and I could see them when they left New Whatcom.

Q. Was there any time, while you were attending the trip, when the steamboat men had to open the trip themselves? A. No, sir.

Q. At no time? A. No, sir, there was not.

Q. You say you have been on the jam recently?

A. Yes, sir.

Q. When was the last time the defendant took out any of the drift from that boom?

A. I could not say as to that. I do not know whether they have removed any since I left or not.

Q. When did you leave? A. In July, 1894.

Q. Is there any channel by which boats can get into the river?

A. Yes, sir, there has a boat gone up twice this year.

Q. Got into the river?

A. Yes, sir, went by the river.

Q. How far did she go?

A. Once only a mile and a half below Ferndale, and the other time I do not know where she went.

Q. She passed into the river above the tide flats, did she?

A. I do not know where she got in. I could not say.

Q. She passed beyond the tide flats and went up the river? A. Yes, sir.

Q. What boat was that?

A. The E. D. Smith, I believe.

Q. What draught boat was it; how much water does she draw? A. I do not know.

Q. Do you know what channel she passed through across the flats? A. No, sir.

Q. Was it possible for her to have gone through the trip and up the river that way? A. No, sir.

Q. Why not?

A. On account of this jam at the mouth of the river.

Q. That jam is still there? A. Yes, sir.

Q. And was at that time? A. Yes, sir.

Q. You say that none of the drift has lodged against the piling?

A. No, sir, none of it whatever.

Q. With that cottonwood tree; did one end lodge on the bank and the roots strike the sand bar?

A. Yes, sir.

Q. How deep was the water on the bar?

A. A foot and a half or two feet of water, but at the time of the freshet there was four or five feet and the water was very high.

Q. Where was the point you indicate where it lodged just above the figures 178?

A. Yes, sir. I removed these piles of the Miller Company.

Q. Were they out at that point at that time?

A. Yes, sir.

Q. From the figures 178 up how far?

A. There was no piling at all until you got to the government work in front of the reservation. There is no piling up there whatever.

Q. How far were the piles on the east side of the channel from this tree that lodged?

A. About 150 feet.

Q. From the end of the tree?

A. Yes, sir; you see the top tan on the bank and the limbs were here. The channel goes about 150 feet from the east row of piles and runs from here to this point where this row of piles is indicated on the west side. As it comes here it spreads out.

Q. That is when it comes to the figures 178?

A. Yes, sir, just above the figures.

Q. How far?

A. About 500 yards and separates and goes in all directions, and makes it very shallow and causes a bar there

Q. Are there any well-defined banks to that channel west of the east row of piles down to the trip?

A. No, there are not.

Q. Who pulled out the piles from the Miller boom?

A. I could not say who pulled them out.

Q. You didn't do it?

A. No, sir, I didn't do it.

Q. You do not know about the quantity of farm produce that has been shipped out of there through that river by steamboat.

A. No, I could not give a correct answer to that. Still I would say the boats are small and I never saw them loaded with anything but hay. I am acquainted with most of the captains who run up there and hay is usually the only cargo they get.

Q. They would carry the produce in the holds of the boats?

A. No, sir, these boats have no holds in them. They have to run on top of the water to get up there.

Q. Have you gone on the boats to investigate whether or not there was a load on?

A. Yes, sir, I have been on them lots of times; their cargo is carried on the deck.

Q. All of it?

A. Yes, sir, that is, such boats that have run since I have been there.

Q. Before that you know nothing about it?

A. No, sir.

Q. When you first went to drive piles was there any drift in that channel?

A. I could not say whether or not there was. There was another crew working for the boom company and they were working near the mouth of the river. I started my work near the south end of the boom, but I never went up there until after I commenced to drive piles.

Redirect Examination by Mr. Newman.

Q. You said this map practically shows the condition of the mouth of the river at or near defendant's boom at the time you first went there; is that correct?

A. At the time I drove them, yes, sir.

Q. In July, 1894, when you left, had there been any material change in the condition of affairs?

A. No, sir, there had not.

Q. The river pursued the same course out over the tide flats that it did in 1890, or when you first went there?

A. Yes, sir, practically; they change a little each freshet.

Q. The attorney for the government question you relative to your employment by the boom company; you had a contract at one time? A. Yes, sir.

Q. Is the boom company owing you anything at this time? A. No, sir.

Witness excused.

CAPTAIN MARMONT called.

Direct Examination by Mr. T. G. Newman.

Q. Give your name to the reporter.

A. T. A. Marmont.

Q. What is your age? A. 56.

Q. Where do you reside? A. In New Whatcom.

Q. How long have you resided in New Whatcom?

A. Twelve years last month; February.

Q. What business have you followed during that time? A. Captain of steamboat.

Q. Are you a navigator?

A. I have been called that.

Q. State what experience you have had on the sea.

A. I have been at it since I was 13—38 years of experience.

Q. Had that experience in any other waters than Puget Sound

A. Yes, sir, all over the world.

Q. All over the world?

A. Yes, sir, except Alaska.

Q. Has that business been continuous?

A. Yes, sir, all but about eleven years in Chicago.

Q. What time were you in Chicago?

A. That was in the 70's.

Q. State what experience you have had as a navigator or steamboat captain upon the waters of Puget Sound.

A. For 12 years I have been at it steady.

Q. You have been filling the position of a master on these waters for the past 12 years?

A. Master, mate, and pilot.

Q. State what waters tributary to Puget Sound you have navigated during that time

A. The Nooksack River, the Skagit River, the north and south forks and the Snohomish River. Both forks.

Q. State what experience you have had on the Nooksack River and the first experience.

A. I think it was in 1887 or 1888. I was running there all one summer on the old Edith.

Q. Either 1887 or 1888?

A. Yes, sir, close to that time.

Q. Was there any boom at the mouth of the river at that time?

A. No, sir—wait! there was a sheer boom at Clark's place.

Q. Any permanent boom? A. No, sir.

Q. Any boom constructed by the driving of heavy piles? A. No, sir.

Q. In what capacity did you serve on the steamer at that time?

A. She was a small boat and I served as mate and deck-hand, and when the captain was sick I took charge.

Q. Who was the captain? A. Randolph.

Q. How far did you run up? A. To Lynden.

Q. Were there any good wagon roads connecting Lynden and Ferndale with New Whatcom?

A. No, sir.

Q. Any railroads connecting them with New Whatcom? A. No, sir.

Q. At that time had the Nooksack River valley any connection with railroads or wagon roads with New Whatcom? A. No, sir.

Q. What amount of the business done at Ferndale and Lynden and along the river at that time was transacted by boats on the river?

A. We would make a trip whenever we could; sometimes once a week and sometimes ten days. It was according to how we got into the river on account of the snags.

Q. Are you thoroughly acquainted with the Nooksack River from Lynden to its mouth, and also acquainted with the mouth of the river, its channels and the tide flats? A. Yes, sir.

Q. And also the boom? A. Yes, sir.

Q. At the time you refer to when running on the Edith, did you experience any difficulty in navigating the river at its mouth and up along the channel?

A Yes, sir, every trip.

Q. Every trip? A. Yes, sir.

Q. State what occasioned that difficulty.

A. We pulled her over sand bars and had to get floating snags out of the road and trees out of the road and every thing else.

Q. You experienced considerable difficulty the summer you ran? A. Every trip.

Q. Where were these snags and trees?

A. In the mouth of the river

Q. On the tide flats or in the channel?

A. In the channel near McDonald's to the church near Clark's

Q. Between Clark's and tide water? A. Yes, sir.

Q. How long were you delayed at any one time?

A. Sometimes a couple of tides and sometimes two or three days taking out snags and stumps

Q. Have you ever had any experience in navigating that river since?

A. No, sir; the boat I ran drew too much water. We never got nearer than McDonald's.

Q. How much did the Edith draw?

A. About as much as a duck would take; only six inches.

Q. When loaded?

A. About three feet; six inches sometimes. About three feet, according to what kind of a load we had.

Q. At what time could you get into the river? I speak of the tides.

A. On top of high water.

Q. Could you go into the river at half tide with the Edith, before the construction of the boom?

A. No, sir, never.

Q. After you left the Edith, what boat were you on?

A. I think I was on the old Phantom with Fred Monroe, then on the Evangel; I have been on the whole batch of them on the sound.

Q. What was the next boat you commanded

A. The Lone Fisherman.

Q. And after that? A. The Saranack.

Q. What kind of a boat? A. Propeller

Q What kind of boats go on the Nooksack River?

A They are called wheelbarrows—sternwheelers.

Q. Are you acquainted with the boats that have navigated the Nooksack River?

A. Familiar with every one.

Q. How much draught had the Saranack?

A. Five feet, six inches.

Q. Was her draught too deep to enter the Nooksack River?

A. It was too deep and I never tried, as I knew better on account of running on the Edith.

Q. You knew you could not get in with the Edith?

A. No, sir.

Q. Could you not enter it on the high tide?

A. No, sir, not past McDonald's wharf, at Marietta.

Q. Did you ever know of a boat drawing 5½ feet entering the Nooksack River? A. Never.

Q. Did you ever know a boat by the name of the Washington?

A. She used to go from Seattle up here.

Q. Did you ever know of that boat navigating the Nooksack River?

A. She went once to McDonald's wharf from Seattle. She had some freight for Lummi and went and landed it.

Q. Did you see her at that time?

A. Yes, sir.

Q. How much did she draw?

A. When the old Washington was loaded I saw her draw five feet.

Q. When loaded to draw five feet, could she have navigated the Nooksack River?

A. No, sir, she was too long.

Q. What personal experience have you had since you navigated the Edith at the mouth of the Nooksack River, near the defendant company's boom?

A. I took the first crowd of surveyors to the boom, and I took the whole gang of you on the high tide and we had to go back the minute the tide turned, and Wilson and the others were there in a skiff.

Q. What boat did you have? A. The Saranack.

Q. And drawing five feet six inches she was too deep draught to go very near the mouth of the river?

A. I could not go near it on the west side.

Q. Were you frequently near that boom afterwards?

A. For you folks nearly every day.

Q. What time of year was that or what year?

A. I think it was in 1889 or 1890 when you commenced

to drive piles. I remember of taking over your men provisions; the year is out of my mind.

Q. After the boom was constructed, did you ever have occasion to go over with your steamer?

A. Yes, sir, towing logs.

Q. Often?

A. I was towing all the time for the Bellingham Bay Mill. I had a contract with J. S. Monday.

Q. From the boom to the mill?

A. Yes, sir.

Q. How often did you go there?

A. About every big tide.

Q. How many tows have you taken away from that boom?

A. I could tell from my books, but I cannot tell now. I was towing the whole time and used to take back boom sticks and take piling to your men.

Q. When you went there for a boom, how far would you go? Examine, and answer, if you can, relative to this plat, Defendant's Exhibit "1."

A. This lower trip is not marked, but to the lower trip I used to go.

Q. You indicate a point opposite the letters M, N, O, P, Q, R, S? A. Yes, sir, that is it.

Q. Why didn't you go to the trip marked "FG"?

A. I drew too much water.

Q. Even at high tide? A. Yes, sir.

Q. How did the boom get down to the lower trip?

A. They used to drift it down to me.

Q. So you could get it?

A. Yes, sir, and I would take it and tow it out.

Q. How long did you say you ran up the river on the Edith? A. All one summer.

Q. How did you happen to leave here, and why did you stop running on the Nooksack River?

A. Because I did n't want to chop out trees and snags. I can run a steamer but I am no logger.

Q. Did you have a good deal to do of that kind of work?

A. Every trip we had to chop out snags and trees.

Q. What occasioned the snags and trees at the mouth?

A. It was clear up the river, clear to Lynden, and I can handle a steamer, but I do not want to chop trees.

Q. Are you well acquainted with the amount of logs that have come down the Nooksack River and been boomed at the defendant's boom since it was established there?

A. Well, I could not give the amount, but I have towed a great many logs out of there.

Q. Did you do more work of towing than anyone else?

A. Yes, sir, because Murray refused to do it.

Q. Are you acquainted, generally, with the nature and amount of business that has been carried on by steamers up and down the Nooksack River?

A. Yes, sir.

Q. What, in your judgment, is the Nooksack River more valuable for; as an outlet for the logs or for the carrying of goods, wares and merchandise by steam craft on it?

Mr. Brinker. We object, as incompetent, irrelevant and immaterial.

A. I should judge that the timber industry is ten or

fifteen to one as to the other truck, especially since they have good wagon roads.

Q. In your judgment, has the construction of wagon roads and railroads up the Nooksack Valley, connecting it with New Whatcom, affected the amount of freight brought down the river?

A. They bring it in wagons now pretty much.

Q. Do you know whether there has been any more impediment to the navigation to water craft since the boom was constructed than there was before?

A. Not in my estimation.

Q. Have you been at the mouth of the river on your steamer at any time when any jams have formed there since the boom was constructed?

A. No, sir, my boat drew too much water.

Q. You could not get far enough up?

A. No, sir.

Q. Is there any thing I have omitted relative to this subject?

A. No, sir, unless it is about our running up Steamboat slough; we always went through there.

Q. When did you go there?

A. Always up that slough. We never went any other way. That was the only channel. There was no channel where the boom was.

Q. Do you know what caused that channel to shift and change?

A. If I passed my judgment, it was you people pulling out the snags and trees which you have done.

Cross-Examination by W. H. Brinker.

Q. You say because of the construction of a wagon

road from New Whatcom to Ferndale the greater portion of farm products has been hauled out by wagon?

A. Yes, sir.

Q. That has been since the jam formed?

A. Since they built the road.

Q. Did they haul by wagon in preference to a boat?

A. They used to come in in preference to steamboats.

Q. Who did that when the river was open?

A. I cannot give the names.

Q. You do not know them?

A. No, sir,but I know they came in for I have seen them.

Q. Where was there a jam before that boom was constructed?

A. There is the channel down through their boom and we used to go around by McDonald's that way. No (indicating), that is it there. That is a little island there. We knew them all going through.

Q. Did you always go through Steamboat slough?

A. Yes, sir.

Q. What was there to prevent you going this way by the boom? A. It was always blocked up.

Q. Always was?

A. I never seen it no other way, and over on this side there was another lot of snags and roots, and we turned short here and went in here.

Q. You mean you turned out of the water into the slough?

A. That was the channel in those days, right down here.

Q. Where did you find any obstructions before that boom was constructed?

A. Clear up the river.

Q. About the mouth of the river?

A. About the church and by Clark's and near Tause's.

Q. About the mouth of the river I am speaking.

A. Right about Clark's place and down here along this island.

Q. Down in Steamboat slough?

A. Yes, sir, we would run up to McDonald's. You have not McDonald's have you?

Q. No. Was there any open water down this straight channel as indicated by that arrow?

A. Yes, sir, until we got to Steamboat slough.

Q. And then the channel turned into Steamboat slough? A. Yes, sir.

Q. There was no channel, then, following that down?

A. No, sir.

Q. Why not? A. It was blocked up.

Q. How far down?

A. Clear down to tide water.

Q. Is n't it a fact that there was a channel beginning at the mouth of the river where the arrow I mark is and following down towards tide water between two rows of piles as indicated on this map, clear down to the trip?

A. Not any, them days.

Q. Not at all? A. No, sir, I will swear it.

Q. A boat drawing 2½ or 4 feet of water could not have gone from the point where the arrow is down through the space that seems to be occupied by these piles to the trip, before that boom was constructed?

A. No, sir, we always went down Steamboat slough.

Q. Do you know Captain Maltby? A. Yes, sir.

Q. He was navigating boats?

A. He was steering them.

Q. What is the difference?

A. You never saw a rancher that could navigate a boat; put him loose on the bay in a fog and he could not get back.

Q. You used the word as a seaman would use it on the high seas?

A. It can be used in several forms.

Q. Was not Captain Maltby running a steamboat up that river before the construction of that boom?

A. I think it was in 1890 that I towed his boat down from the mouth of the river for her machinery.

Q. Was that the first boat he ever ran?

A. Yes, sir, and the only one.

Q. That was in 1890?

A. Yes, sir, I am sure it was in 1890.

Q. Were you acquainted with all the masters of the boats that ran there before the construction of that boom?

A. Yes, sir.

Q. For eight or ten years? A. Yes, sir.

Q. And until he got the Triumph he was not running on the river? A. No, sir, he was ranching at Lynden.

Q. Sure of that, are you? A. Yes, sir.

Q. You never removed any snags from the channel on the flats, did you, before the construction of the boom?

A. In Steamboat slough we pulled them out.

Q. How far was that from the mouth of the river?

A. Right where we turned the corner.

Q. Just after you left the mouth of the river?

A. Yes, sir.

Q. The most of the logs and snags that obstructed your passage before the construction of this boom were in the river above its mouth?

A. Some of them were at the mouth and clear up to Lynden; they were in the road.

Q. The river was narrow, but deep, past its mouth?

A. It was sometimes only six inches and sometimes wait at Lynden for three or four days for a rain or a big dew.

Q. How about the tide?

A. We always had to wait for high tide.

Q. The tides come oftener than every two or three days?

A. Yes, sir,but we would wait at Clark's or McDonald's; we could not get out on the short run; that is, if it was less than eight feet.

Q. Could not a boat go in on half tide?

A. No, sir, I never did, and they tried it time and again on the Edith and could not get in.

Q. Struck the jam ?

A. Yes, sir, struck a rock and broke a hole in her; it is at the mouth of the river yet.

Redirect Examination by Mr. Newman.

Q. What was the year, if you recollect, in which you ran the Edith and which you testified you used Steamboat slough entirely?

A. It was in 1885 or 1886.

Q. 1885 or 1886?

A. Yes, sir, three years after I came here.

Q. And at that time, on cross-examination, you testified that the only way steamboats could get up in the river was through this upper slough, which is called the old channel on this plat? A. Yes, sir.

Q. And also that the water from the point of the arrow just below the old channel down to where the boom was located was jammed with logs and impassable.

A. Yes, sir.

Q. No boat could get up there?

A. I never seen one going up there.

Q. Did you say you never did see any go that way?

A. Yes, sir.

Q. Do you hold any official position in this county, Whatcom County? A. Yes, sir.

Q. What is it?

A. They call me wreck-master.

Q. How long have you held that official position?

A. This is the second term.

Recross Examination by Mr. Brinker

Q. What are your duties?

A. There is no business here; there are no wrecks. There is no money in it.

Q. What is your salary?

A. I have to whistle for it.

Q. What did they have against you?

A. I do not know.

J. J. DONOVAN called and sworn.

Direct Examination Conducted by Mr. Newman.

Q. State your name. A. J. J. Donovan.

Q. Your age? A. I am 36.

Q. Your residence? A. Fairhaven.

Q. How long have you resided in Whatcom County?

A. Nearly seven years.

Q. What business have you been engaged in during that time?

A. Civil engineering and superintendent.

Q. Are you a civil engineer by profession?

A. Yes, sir.

Q. What experience have you had in that line and for what length of time?

A. Considerable; I have followed civil engineering since I was 21. I was three years in an engineering school and the rest of the time in actual experience.

Q. For whom were you doing business when you first came to Fairhaven?

A. For Nelson Bennett, of Tacoma.

Q. And after that?

A. Shortly afterward for the companies that were organized, the Fairhaven & Southern Road. Was made general engineer for that company. Also the Fairhaven & Northern.

Q. For how long?

A. Until completed and turned over to the Great Northern.

Q. What business did you follow after that?

A. After that I was general engineer for the Blue Canyon Coal Mining Company and later its general superintendent of its mine and the Bellingham Bay and Eastern Railroad.

Q. Do you serve in that capacity at this time?

A. Yes, sir.

Q. Are you acquainted with the Nooksack River?

A. Yes, sir.

Q. How long have you been acquainted with that stream?

A. I had occasion to examine it six years ago.

Q. What was the occasion of the first examination?

A. To determine the best place to cross it for the Fairhaven & Northern Railroad going north from here.

Q. Where did you select your location for crossing?

A. At the town of Lynden.

Q. When, if you recollect, was that bridge constructed? A. In the summer and fall of 1890.

Q. Did you superintend its construction?

A. Yes, sir.

Q. How long were you engaged in that construction?

A. The work began sometime in the latter part of July or August and the bridge was not completed until November.

Q. Were you frequently there at the approach during that time? A. Yes, sir.

Q. Did you pass up and down the river?

A. I had no occasion to go up and down the river, excepting at one time to bring a pile-driver when the temporary bridge washed out.

Q. Were steamers navigating the river at that time?

A. Yes, sir.

Q. Any number of them?

A. I think there were two.

Q. Was there any considerable business in the way of freight being conducted up and down the river at that time?

A. Not that I noticed. Steamers made one or two trips a week usually.

Q. Have you been generally acquainted with the nature and amount of traffic done by steamers up and down the Nooksack River since you have been here?

A. Only in a general way.

Q. From your general knowledge, what would you say as to the amount of business so conducted?

Mr. Brinker. We object, as incompetent, irrelevant and immaterial.

Q. How have you derived your general knowledge to which you have referred?

A. I had to study the probable amount of traffic for the railroad company.

Q. You have made some investigation as to the amount up and down the river?

A. I made investigation in all parts of the country.

Q. Since you have been here, what can you say as to the amount of any business so conducted by steamers on the Nooksack River?

A. The business has been of small magnitude.

Q. Of what?

A. Of small magnitude, especially since the railroad have been constructed to the river.

Q. Are there any first-class wagon roads now connecting the cities of Fairhaven and Lynden with New Whatcom?

A. Yes, sir, and most of the regular traffic goes over these roads.

Q. What would you say from your knowledge of the river and the traffic conducted thereon as to the future business that would seek an outlet by way of the river, rather than by the railroads or wagon roads?

Mr. Brinker. We object, as incompetent, irrelevant and immaterial.

A. What?

Q. (Question read.)

A. My judgment is that with the railroads now reaching out from the bay and the wagon roads reaching the river that the traffic on the river would be confined to the ranchmen on the banks that could not reach these roads easily by cross roads.

Q. Is there more than one railroad that taps the Nooksack River valley? A. Yes, sir, three.

Q. Name the others, besides the Great Northern.

A. The Bellingham Bay & British Columbia Railroad.

Q. Where does that reach it?

A. Across the river at Everson.

Q. What other?

A. The Seattle, Lake Shore & Eastern, near Wickersham.

Q. Have you any knowledge as to the timber which is along the banks and in the country tributary to the Nooksack River and its various branches?

A. Yes, sir.

Q. State how you acquired that knowledge, and what is the nature and extent.

A. I acquired the knowledge by going through the timber to see about traffic for the railroads. I went on foot from here to Lynden and Ferndale, and I have been from Lake Whatcom over to the south fork and down the river for several miles, and up the river until it passed into Skagit County, looking to see what timber could be reached tributary to this bay, and I have been through the woods and through the timber I speak of, especially on the south fork several times.

Q. From the examination you have given the river and the timber tributary thereto, which would naturally seek an outlet thereby to the mills and a market by way of the river, what would you say as to that amount in feet of timber which would naturally seek the rivers to the mills and market?

Mr. Brinker. I object, as incompetent and immaterial.

A. There is between one hundred and fifty and two hundred thousand million feet of timber that could be brought out by way of the river. Most of it is in Whatcom County, but some in Skagit.

Q. Are you at all acquainted with the amount of business conducted upon that river, in the way of logging since the Summer of 1890?

A. There have been, since summer of 1889, a number of logging camps on the river; some have gone out of business and some are still in business.

Q. Do you know anything as to the amount of timber that has been floated down the river during that time?

A. I know that the so-called Red mill, on Bellingham

Bay, which was in operation for a year or two, drew nearly all its logs from the mouth of the river.

Q. That mill you speak of is called the Bellingham Bay Mill? A. Yes, sir.

Q. When was it deriving its supply of logs from the river?

A. That was from April, 1890, to May, 1891.

Q. Do you know the capacity of that mill?

A. I understand about 150,000 feet a day, but I am not certain.

Q. From your knowledge of the business in the way of logging and the logs that have come down that river since the boom was established, and from your knowledge as to the amount of steamboat traffic conducted thereon, would you say the river was most valuable for supplying logs for the market, or for steamboat traffic?

Mr. Brinker. We object, as incompetent, irrelevant and immaterial.

A. So far as any traffic is concerned since I came here the logging business has been the most important.

Witness excused.

E. L. COWGILL called.

Direct Examination by Mr. Newman.

Q. Where do you reside? A. In Fairhaven.

Q. How long have you resided there?

A. For six years and a little over.

Q. What business were you first engaged in there?

A. Railroading, townsite building and sawmill and lumber business.

Q. What business were you first engaged in there?

A. I was first manager and secretary of the Fairhaven Land Company. The first active business was when we took charge of the watermill here in Whatcom; that was in December, 1888.

Q. Were you manager of the Whatcom sawmill?

A. Yes, sir, I looked after that.

Q. For what length of time?

A. That came under my supervision until August, 1891.

Q. That was still under the Fairhaven Land Company. That was one of its properties? A. Yes, sir.

Q. Are you or have you been connected in any way with the defendant, the Bellingham Bay Boom Company?

A. I have been and am connected with it

Q. State when you became acquainted with it and in what capacity.

A. I was one of the original ones to get up the company in the spring of 1890, and am a stockholder and the secretary and a member of the board of directors now.

Q. How long have you acted as secretary of the company?

A. Since the fall of 1892; about the first of 1893—December of 1892.

Q. Have you held any other official position?

A. Yes, sir, I was treasurer—I think in 1891—besides being one of the trustees all the time; always a trustee.

Q. Have you been thoroughly familiar and entirely conversant with the business conducted and carried on by said company from the date of its formation to the present time? A. I have.

Q. State when your company began the construction of its boom at the mouth of the Nooksack River.

A. I think it was in May, 1891.

Q. Was that subsequent or prior to your actual incorporation?

A. A little prior.

Q. What was the first step taken in the construction?

A. We sent an engineer over to examine the tide flats at the mouth of the river and make a survey of them.

Q. What engineer was that?

A. Mr. Wellman, a civil engineer.

Q. Do you recollect when you actually incorporated?

A. I think it was in June, 1890, I do not recollect the date, but I think it was sometime in June, 1890.

Q. When did you first begin the work of construction?

A. We commenced the work shortly before the real incorporation took place. We did some preliminary work and got piles ready before the company was incorporated, and the company assumed all the work and went right in when incorporated.

Q. What was this work of construction and until when was it carried on?

A. It was started in May and carried on to the completion of the boom. The driving of the piles and catching logs.

Q. When was the boom completed?

A. In the summer of 1890.

Q. What time?

A. I do not recollect the date, but some time in August

Q. Some time in August?

A. Yes, sir, when we were prepared to catch logs.

Mr. Newman. Defendant here offers in evidence Defendant's Exhibit "2" and Defendant's Exhibit "3," copies of the articles of incorporation and amendments of the articles of incorporation. The original articles, "Exhibit 2," it is admitted and stipulated were filed with the secretary of State, Allen Weir, at Olympia, Washington, on the 5th day of June, 1890, and the amendment to the articles was filed with Allen Weir, secretary of State, at Olympia, Washington, on the 18th day of August, 1890, and it is further stipulated that said original articles were filed for record with the auditor of Whatcom County on the 4th day of June, 1890, and said amendment of the articles of incorporation was filed with said county auditor of Whatcom County on the 15th day of August, 1890.

Q. Are the articles of incorporation here offered in evidence by the defendant, and the amendments to said articles of incorporation, the articles under and by virtue of which this defendant company constructed its boom and since have been operating the same? A. They are.

Q. State what knowledge, if any, you have acquired relative to the location of the defendant's boom at the mouth of the Nooksack River since said boom was erected.

A. I have been there a great many times on business connected with the boom and getting out logs and the general operation of the boom and business.

Q. Have you had occasion to examine the construction of the boom and the channel of the river during these times? A. I have.

Q. How often have you been there?

A. It is now five years ago—well, I should say I have been there not less than 50 or 60 times, perhaps more.

Q. Have you ever been there to examine any jams of drift and stumps and brush which have accumulated at the mouth of the Nooksack River? A. I have.

Q. More than once? A. Yes, sir.

Q. What was your purpose in going there at that time and making such examination?

A. On every high water or freshet in the river there is a great deal of drift wood that comes down, trees and snags, etc., and it made it expensive, the operating of the boom, so much coming down, and I would go over there with the view of studying the situation to see how it could be handled to the best advantage, but it was always a very difficult problem, for the water would rise quickly and come down very quickly. The river just above the mouth has quite a channel on these freshets and a good deal of current. There are one or two landmarks, such as Clark's house and the church on the Indian Reservation. Just as you get to the church there is Steamboat slough. From there the river begins to spread out. Going on down it goes out at different points and there is not enough water to float the cottonwood trees.

Q. State the size of the trees, the cottonwoods and cedars.

A. I have seen the cottonwoods and spruce with the roots and tops 250 feet long; whole trees.

Q. What would be the size of the trees and the roots and the limbs?

A. Some two or three trees must have been five feet through and the limbs practically all on, the small ones only broken off, but all the butt of the limbs on.

Q. How many feet would the butts extend out?

A. From six to ten feet.

Q. Has the company expended any money in labor, tools, powder or otherwise in keeping the channel and the mouth of that river free from mud, drift and obstructions?

Mr. Brinker. We object, as leading and immaterial.

A. Yes, sir, a large amount of money.

Q. State what you know in that regard and what has been expended and the times.

A. On every freshet or high water there is a great deal of drift and snags and roots coming down, of course, mixed up with logs. The men always had orders to keep that cleared out and keep the channel of the river open, so that boats could get up and down with the least delay possible. In order to do that it was necessary to provide them with tools, axes, saws and powder. It was in that way they cleared all the jams until I think it was in December, 1892, that the company bought a steam logging engine and put it on a scow over there for the purpose of hauling logs and keeping the passage clear.

Q. What was the cost of that engine and scow?

Mr. Brinker. We object as immaterial.

A. I think the engine was $750 and the scow $250, and besides the engine and scow there was a large amount of

cable and blocks, 3-4 inch cable for hauling the large logs and snags and 3-8 inch cable for hauling back and hitching on other logs and snags. That was used for hauling off the logs and jams; that is the engine Mr. Van Dermark spoke of using. He spoke of hauling a good many snags from the channel to the east side of the boom. That was done by instructions from the Bellingham Bay Boom Company, the idea being to get these large snags that would not float to get them packed in so as to try and keep a deep channel if it was possible.

Q. Was the boom company troubled at all by shallow water?

A. There has always been trouble with that. Another thing in connection with that. When there is a heavy southeast wind blowing and the water coming down the river at the time of the freshets and it strikes tide water and the current will not float out, but it will come back up the river. I have known it to drive logs and drift from the trip back to Clark's house, so that tends to keep the drift from going out in the ocean.

Q. Has the company expended any money in the way of supplying powder for blasting out the drift and snags?

A. Yes, sir, in five years several thousand dollars for powder alone.

Q. Has the company under its charter done anything in the way of clearing and improving the channel of the river above its mouth?

A. Yes, sir, the company spent several thousand dollars from just above Nugent's Ferry clearing out the channel of the river; clearing out the snags and roots of trees.

Q. When was it done and how?

A. That was done in 1890; done by employing men and putting them to work, furnishing them tools and powder.

Q. Do you recollect how long these men were engaged in so clearing the river?

A. Not definitely, but I think about 60 days.

Q. Do you know how many were so employed by the company?

A. No; that would only be guesswork, but there were two gangs at different times and they were there from 60 to 90 days and from 10 to 20 men, depending on the stage of the river.

Q. What was the cost of the clearing of the main channel of the river by these men at that time?

A. My best recollection is about $12,000.

Q. Paid by the defendant company?

A. Yes, sir.

Q. From your knowledge as treasurer and secretary of the company and trustee of the company, what amount of money has the company paid out during its existence for the keeping of the mouth of the river clear from snags, brush, drift and trees?

Mr. Brinker. We object, as immaterial.

A. I should say not less than $15,000.

Q. State, if you know, the cost of the construction of the defendant's boom at the mouth of said Nooksack River.

Mr. Brinker. We object as incompetent and immaterial.

A. About $60,000—no, it was more than that—no, that is right.

Q. In the construction and the amount subsequently paid for clearing the channel of the river and keeping the mouth clear from obstructions of all kinds, the defendant company has expended in the neighborhood of $80,000?

Mr. Brinker. We object as incompetent, irrelevant and immaterial and leading.

A. It has.

Q. Are you acquainted with the amount of logs that have been cut, boomed, sorted, stored and rafted out of the boom of the defendant company? A. I am.

Q. Can you state by years the amount so boomed out?

A. Pretty closely.

Q. Can you refresh your memory in any manner?

A. Yes, sir.

Q. If you can, refresh your memory and state the amount of logs that were boomed out of defendant's boom in 1890.

Mr. Brinker. We object, as incompetent, irrelevant and immaterial.

A. 479,450 feet in 1890.

Q. In 1891?

Mr. Brinker. Same objection.

A. 5,832,858.

Q. In 1892?

Mr. Brinker. Same objection.

A. 3,437,496.

Q. In 1893?

Mr. Brinker. Same objection.

A. 4,658,762.

Q. In 1894?

Mr. Brinker. Same objection.

A. 344,590.

Q. What is the total amount that has been rafted, stored and boomed?

A. 14,752,559 and about 400,000 this year; in 1895.

Q. To what mills were these logs taken that came from the boom?

Mr. Brinker. Same objection.

A. To the Fairhaven Land Company's mill in Whatcom, the water mill. To Wyman & Marsten's mill in New Whatcom, W. L. Miller's mill at Whatcom; the Bellingham Bay mill in Fairhaven and Woodin's mill in Fairhaven, and I think some few thousand to Heacock's mill in Fairhaven.

Q. Anything to the Washington Cedar Shingle mill?

A. Yes, sir, in New Whatcom.

Q. State whether or not any of these mills have been entirely dependent for their supply up the logs coming from the Nooksack River and defendant's boom.

Mr. Brinker. We object, as incompetent, irrelevant and immaterial.

A. Yes, sir, some of them relied entirely, being the most convenient.

Q. From your personal knowledge state what you know.

A. The Bellingham Bay Mill made large contracts for the logs, with a view of having a supply.

Q. With whom were these contracts entered into?

Mr. Brinker. Same objection.

A. With the loggers on the Nooksack River.

Q. Go on.

A. The contracts were entered into with the loggers on the Nooksack River. There were several of them, thinking the output of their camps would be sufficient to keep the mills running steadily, and besides the large Bellingham Bay mill, the Woodin mill and the Hitchcock's mill were relying upon getting a large supply from the Nooksack River.

Q. These mills you have referred to as receiving their supply of logs coming through the defendant's boom, are any of these not now in operation?

Mr. Brinker. We object, as incompetent, irrelevant and immaterial.

A. All idle except Woodin's mill.

Q. Do you know why?

A. Owing to the depression in the lumber trade.

Q. Why has the logging and the boom business on the Nooksack River fallen off; I mean the amount and quantity?

Mr. Brinker. Same objection.

A. Owing to the depression in the lumber business and the price of logs, loggers have shut down their camps and not so many logs are cut.

Q. Are there as many now brought to the boom to be sorted and rafted as there was in 1890, 1891, 1892, and 1893 and 1894?

Mr. Brinker. Same objection.

A. No.

Q. For the last five years state whether or not you have been acquainted with the market value of saw logs?

Mr. Brinker. Same objection.

A. Yes, sir.

Q. What was the market value per foot board measure in the years 1890 and 1891?

Mr. Brinker. Same objection.

A. They sold as high as $7.00; that was perhaps an extreme price, but there were large sales at $6.50.

Q. For good, merchantable timber?

A. Yes, sir, I knew some few logs as high as $7.50, but the bulk were at $6.50.

Q. And what is the market value at this time?

Mr. Brinker. Same objection.

A. I should say $5.00.

Q. And for the years during which the defendant company has operated its boom, what would you say was about the average market price of good, merchantable saw logs?

Mr. Brinker. Same objection.

A. About $6.00 a thousand.

Q. Are you at all acquainted with the amount of business conducted and that has been conducted on the Nooksack River since the establishment of defendant's boom by steamboats?

A. Yes, sir, I am familiar with it by having instructed the men at the boom to keep account and keep track of the number of boats going up the river and to watch as to how much cargo they carried, and the reports were that boats were only going up at long intervals and only for part of a load of hay.

Mr. Brinker. I move to strike out as hearsay.

Q. When were these reports made out?

Mr. Brinker. I object as incompetent, irrelevant and immaterial.

A. I received them as an officer of the boom company from men at the boom, and I would also state that from captains of the boats I had occasion to find out when they were going up the river, and at that time we had to send supplies and would sometimes have to wait a week to get them up, and sometimes had to get them to make a special trip, as there was not freight enough to pay them to go.

Mr. Brinker. I move to strike out the answer for the same reason.

Q. In sending supplies, the provisions, this powder, etc., to the men operating the defendant company's boom, you had occasion to employ the same steamers that navigated the Nooksack River?

Mr. Brinker. We object as irrelevant and immaterial and leading.

A. Yes, sir.

Q. And a part of your knowledge of the traffic on the Nooksack River during the continuance of the boom was secured from the captains of the steamers that operated the river?

A. Yes, sir.

Q. From your general knowledge of the number of steamboats and the amount of business transacted by them on the Nooksack River during the years of the continuance of the boom by the defendant company at its mouth, what would you say as to the value of the commerce carried on by said steamers during that time?

Mr. Brinker. We object, because the witness has not shown that he has any knowledge on the subject so as to qualify him to express an opinion.

A. What?

Q. (Question read.)

A. I should say the logging industry was of vastly more importance. I know of several drives—

Q. Wait, that is not the question asked. Read the question. (Question read.) You can say as to the values and as to the quantities transported on that river.

A. I could not give that.

Q. Could not give an estimate?

A. No, sir.

Q. From the knowledge before referred to by you and your knowledge of the amount of value of the saw logs and timber product floated down said river and boomed at the defendant's boom, what is, in your judgment, the relative value or amount of the traffic on the river by the way of steamboats and the saw logs coming down?

Mr. Brinker. We object, as incompetent, irrelevant and immaterial, and witness not having shown he is qualified to express an opinion.

A. From my knowledge of the country, and the estimates I have made of the timber products tributary to the river, and my general knowledge of the settlements and what land is under cultivation, the timber product seems to be the most important by long odds of anything near the river, and I know—some of my information I got from steamboat captains—I know that numbers of times they have had little bunches of freight far up the river and they would not go. They would sometimes take a few tons

and go as far as Ferndale, providing they could get a tow of logs, showing that the logging traffic was of a good deal of importance to the steamboat men.

Q. What is the value of the logs and timber product which has been cut, sorted, separated, stored, rafted and boomed at the defendant company's boom since its construction up to the present time?

Mr. Brinker. We object as incompetent, irrelevant and immaterial.

A. About $90,000.

Q. From your visits at the boom, the knowledge you have obtained relative to the character of the mouth of the Nooksack River, and from what you have seen of the jams of drift and logs at its mouth, what would you say was the cause of the formations of such jams?

Mr. Brinker. We object, as the witness has not shown himself qualified to express an opinion.

A. It is caused by the large trees and roots coming down the river at high water and lodging on the bars where the river becomes too shallow after passing just below the church on the Indian Reservation.

Q. In your judgment, are these jams occasioned in any manner whatever by the construction or erection of the defendant company's boom?

Mr. Brinker. Same objection.

A. They are not.

Q. State your reason for saying so.

A. Because I have been over there to examine jams after they were formed and have seen them formed before they got to the sticks of the boom company's boom.

Q. Have you examined a certain jam which at this time is located in the mouth of the river?

A. I have.

Q. When did you make such examination?

A. I made the examination some time last fall; I have forgotten just when.

Q. State whether or not the brush and drift in that jam is lodged against any of the boom sticks or piles of the defendant company's boom.

A. It is not, or was not at that time.

Q. Indicate on this plat about where that jam is—referring to Defendant's Exhibit "1"—or where it was at the time you examined it.

A. It was right in here where Miller's boom is; right here.

Q. Opposite figures 1, 7, 8?

A. Yes, sir.

Q. Were there any logs between the outer point of the jam as indicated by Miller's boom and the eastern point of the defendant company's piles—any snags?

A. There were some snags and roots piled along the east row of piles that the company had piled up there that had been pulled from the channel on the previous jam, the object being to make them a kind of breakwater.

Q. Was there any open water between the east line of the defendant company's boom and the jam in question?

A. Yes, sir.

Q. In any of the jams of brush and drift you have observed since the construction of the boom, have you seen any that were caused by said brush, snags and drift being

carried against the boom sticks and piles of the defendant company? A. No, sir.

Q. Where does such drift lay and lodge relative to the location of defendant's piles and boom sticks?

A. It lodges on the bars and sand banks formed at the mouth of the river before it reaches our piles and boom sticks.

Q. What effect upon the mouth of the river would the removal of defendant's boom have so far as navigation is concerned? A. It would endanger it.

Q. Why?

A. Because the boom company necessarily does considerable work there to keep that drift and these snags and trees out of the way, while if they were left they would form large jams before anyone would take sufficient interest to remove them.

Q. I do not recollect whether I brought out clearly the exact dates of the beginning and completion of the construction of the boom. State again, if you have not stated.

A. I think I stated we did some work in May as individuals before we incorporated. Our incorporation took effect in June, 1890, and assumed all work that had been done by individuals and continued work, and I think it was the middle of August when we were ready for logs.

Q. Was it later than the last of August, 1890?

A. No, sir; I know, because I was interested in the boom, and through my interest in the Fairhaven Land Company was interested in the Bellingham Bay Mill, and we were anxious to get logs from the Nooksack River,

and we rushed the work off the boom so they could get logs that had been contracted for on the Nooksack River with loggers.

Q. Did they accept them? A. Yes, sir.

Q. Can logs be brought down that river and brought to the mills without a boom at its mouth?

A. No, sir, there would be no means of catching them, and if the wind was favorable they would go out to sea, and if there was a southeast wind they would go all over the mud flats.

Q. Have you any further knowledge or means of knowing the nature and amount of business transacted by steamboats on the Nooksack River since the summer of 1890, other than you mentioned yesterday?

A. Well, I mentioned that I got information at times as to the business they were doing and at times we would have supplies and provisions to send over and they would not go over, because they didn't have freight enough to go up the river with.

Q. Did you or didn't you ascertain, as a matter of fact, the times the boats did go over?

A. Yes, sir; I was going to state that they would not go, as they didn't have freight enough, and it necessitated us to hire teams to haul it over; it was cheaper for us to do that than to charter a boat.

Q. What is the time referred to by you; when were you sending goods over to the boom?

A. From 1890 to 1894; 1891, 1892, 1893 and 1894.

Q. How often did you send goods and what was the nature of the goods sent?

A. Groceries, provisions, powder, tools; occasionally axes, saws and peavies, but it consisted mostly of provisions and powder, and we would send them provisions not less than every two weeks, and sometimes it was every week.

Q. Was it cheaper and more convenient to transfer them by steamer to the boom?

A. It was cheaper if the boats had business, but it cost more to have them make a special trip.

Q. Did you have much trouble to secure steamers during these years to transfer provisions to the boom?

A. It was very difficult at times. Sometimes they would not go when they promised.

Q. Was there any regularity about their going?

A. None; they had no regular time.

Q. Would they run as often as once every two weeks?

A. They didn't average that often.

Q. Is there anything else which I have neglected to ask you on that you desire to state?

A. No, I think we have covered it very fully.

Q. There is nothing? A. No, sir.

Cross-Examination by Mr. Brinker.

Q. Were you on the ground before the driving of the piles of this boom was commenced?

A. I was there during the progress of the driving and at the commencement of the driving. I went over with the men.

Q. Were you there when the survey was made before the piles were driven?

A. I was there during the survey.

Q. Did you observe the channel of the Nooksack River? A. Yes, sir.

Q. What was the condition of the Nooksack River as to the presence of drift and logs when that survey was made?

A. There was a good deal of brush and rubbish scattered around there. Very much the way it has been all the time since.

Q. From the point where the arrow is located on this blue print extending in a straight line as indicated by the arrow, the arrow at the mouth of the river near Steamboat slough, following the course indicated by that arrow down to the point marked "Trip," what was the condition of that channel or waterway at that time as to the presence of logs and drift? A. There was drift here.

Q. That is outside of the channel.

A. There was drift scattered to the west side of the channel. My recollection is that steamboats could, at high tide, get in either channel at that time by selecting a high tide.

Q. Was it necessary for them to select a high tide in order to pass over the top of the drift or the bars?

A. To pass over the bars.

Q. Was it necessary to remove any of the drift or logs in order to place these piles as they now are in your boom?

A. I am not very clear about that. I think along in between a point marked 109 and 119 in the east line of defendant's boom at the upper end, I think there was a lit tle done in there, but not to any great extent.

Q. That is east of the channel?

A. Yes, sir, and some to the westward; west of the point marked "Dolphin's" below the Miller boom.

Q. And to the west of the point marked "Trip"?

A. Yes, sir.

Q. They were to the west of the channel through which you say the boats could go when they could get over the bars? A. Yes, sir.

Q. What is the condition of this channel about which you have been interrogated as to the presence of logs and brush and rubbish now?

A. I have not been over there for two or three months. After a jam was formed between the points marked 178 and 98 I was over there and examined it and gave orders to the men to open a passage for steamboats at the point marked 109. I was over there afterwards and saw an open passage there sufficiently wide to admit any boat that I ever saw or knew of going up the Nooksack River.

Q. How long ago was that?

A. That was two or three months ago.

Q. How far did the jam extend then up and down the channel from the trip towards the mouth of the Nooksack River where Steamboat slough leads off?

A. The jam did not extend to Steamboat slough at that time.

Q. For what distance did it extend from the trip?

A. At the point 109 there was a free and unobstructed passage up the river.

Q. How was it below the point 109 to the trip?

A. To the point marked 178 there was considerable drift, and boats could not get through.

Q. How long had that condition existed?

A. I think about two months before I was over there before the open way I spoke of was made, and I do not recollect the date it went in.

Q. How long has that jam existed as it now is from the point marked 178 upward toward the mouth of the Nooksack River?

A. I do not know the date; sometime in the fall of 1894 is my recollection that it went in there.

Q. Prior to that time had this way been open from the mouth of the Nooksack River from the point where the old channel leads off down to the trip?

A. It has always been open since the boom company was there, except at times of high water, when large quantities of drift came down. As soon after the appearance of high water as it could be done, the boom company cleared it out and kept an open channel.

Q. When was the last work that the company did at the point 178 and up the river after the formation of that jam?

A. They have not assisted at the work yet. The boom company has leased the boom to Elery Rogers, and my understanding is he has been doing work and has men working there.

Q. You do not know that of your own knowledge?

A. No, sir.

Q. When was that lease made?

A. In the latter part of 1894.

Q. When were you last on the ground before that lease was made when the company was doing any work towards removing that jam there?

A. When I speak of the work at 109?

Q. When were you there when they were removing the jam at 178?

A. They didn't work as low as that. In case a boat wanted to go up we have the quickest point that could be opened, opened up there.

Q. So, if I understand you, at the time the company went upon the grounds for the purpose of constructing their boom, the channel beginning at the arrow at Steamboat slough and from there down to the point marked "Trip" was free from drift?

A. I do not know as it was entirely free from drift, but there was room enough for boats to get through.

Q. You have indicated that the drift laid east of that channel from the point that is marked 108 to 119 and that the drift laid west of the channel west of the point marked "Dolphin"? A. Yes, sir.

Q. That being true, it would leave the channel open from the arrow just above the opening to Steamboat slough continuously down to the trip, would it not?

A. I do not know how much drift there was in there. We didn't have to move such a great deal. I know boats could get in there by taking their time. Whether the whole channel was clear, I do not know.

Q. You have stated that the boats would have to wait for high tide to get in? A. Yes, sir.

Q. And in going in they went over the bars?

A. Yes, sir.

Q. So the drift that was there, if the tide was favorable didn't impede the boats?

A. I understand you speak of the time the boom was constructed?

Q. Yes, sir.

A. The drift didn't keep them from going in by taking their time. They can go in now by taking their time.

Q. Where can they go in? A. At the point 109.

Q. That is, to enter through a channel marked "Small channel, 18 inches deep," to the east of the boom, would they not?

A. Not necessarily. I have seen them follow up along the east side of the boom company's piles. These points marked "Tide Flats" between the various channels are constantly changing with every high water. The action of the southeast winds and the tide water meeting the current holds that water there so that a sediment is deposited. The river water does not have a chance to go out and the sand settles.

Q. But these tide flats are on the east and west side of the boom, are they not?

A. It also has the same effect in the channel of the river.

Q. There are no tide flats marked in the channel of the river?

A. They are not marked tide flats; this is supposed to be the channel of the river, but it is not uniform in depth. There is a bar right there that the roots catch on.

Q. What point? A. 178.

Q. But there is no point at 178 marked tide flats?

A. No, sir.

Q. These tide flats are east and west of the two lines of piles?

A. That channel shifts there considerably. I have known it to follow down the point marked "Miller's Boom."

Q. You say you have known boats to go up on the east side of the east line of piles and enter between the piles at the point 109? A. Yes, sir.

Q. Then that would indicate that the east line of piles was driven down through that channel?

A. No, sir, because the river is deeper over to the west of the line marked "Miller's Boom," and at high tide with the tides coming in from the bay and the boat only drawing two feet of water, they come across the tide flats.

Q. If the water is deeper to the west of the point marked "Miller's Boom," then these waters are entirely enclosed by the waters of that boom? A. Yes, sir.

Q. Beginning at the west at the point marked "B," and following the line of Miller's boom up to the highest point of that boom towards the mouth of the river, that boom would include in the space that deep water you speak of?

A. The piles of that boom have been removed.

Q. Since when?

A. Since it was acquired by the Bellingham Bay Boom Company.

Q. When were they removed?

A. Some of them in 1891.

Q. Were they removed before this suit was brought?

A. Yes, sir; some of them are down here. Those removed were from a point 109 down.

Q. Down how far? A. To 178.

Q. What was this trip left for?

A. For the purpose of taking out logs and allowing boats to enter the river.

Q. How wide is that trip? A. 181 feet.

Q. Have you ever been there when a boat tried to get through? A. Yes, sir.

Q. What means were there to accommodate the steamers?

A. One end is fast at F and swings at that point and opens at G, so it can swing out to the east or west, according to the tides or current.

Q. Who was there to operate that trip?

A. The men in the employ of the boom company, and they had instructions to help as much as they possibly could.

Q. Where were these men?

A. They lived in a cabin at that point.

Q. South of a point indicated by the letters M, N, O, P Q, R, S? A. Yes, sir.

Q. About how far from the boom?

A. That must be 300 or 400 feet.

Q. How long would it take a man to go from the point indicated as the place where the men had the cabin to the trip? A. Three to five minutes.

Q. How far was it?

A. 1000 feet; there is the school; I should say it was 1000.

Q. Were you ever there when the boats were delayed on account of the trip?

A. No, sir, I have gone over on the boats from here,

and the custom was to whistle before they got there for a long way out, and the same coming down the Nooksack river.

Q. How far is it from the east row of piles of the defendant company's boom to the row of piles marked Miller's boom at the point 178, and from there south to the south end of Miller's boom?

A. It is close to 209 feet; the scale is 200 feet to the inch. 200 feet, about.

Q. It varies some, doesn't it?

A. Yes, sir. This map is as near correct as it can be, for it was made by a civil engineer and he made his own measurements.

Q. Where is the first bar in the river as you go down after leaving the mouth of Steamboat slough, proceeding down the channel west of the defendant company's boom, and east of what is marked Miller's boom, where is the first bar?

A. I am hardly familiar enough to state accurately, but my recollection is there is one just south of the figures 115, but not such a bar as down at 178.

Q. The bar at 178 is the bar that caught the drift you spoke of?

A. Yes, sir; this bar extended down to about here, to the arrow south of 178, beginning just a little north of 178.

Q. Did you hear the witness who testified to the cottonwood tree forming a jam? A. Yes, sir.

Q. Where did that lodge?

A. I do not know as I can designate the bar. I have been over on several of the jams and they are usually

formed by cottonwood trees or spruce. They come down with drift after them and with a dozen men you could not cut it out.

Q. Where did that cottonwood lodge?

A. I have seen them north of 178 and west of the figures 115, and at a point west of the arrowhead that is just south of the figures 109; I have been upon the trees that caught there and walked over them and looked at them with their immense limbs, and I know there was one tree we used over two boxes of powder on. The cottonwood is so heavy it does not float. It does not extend out of the water, but the most of them is under water, and we had to bore holes in them and put the powder in. A tree five or six feet through is very difficult to get out.

Q. How long was the tree you saw just south of the figures 109? A. Over 200 feet long.

Q. How near did it come to the piles in the east line of the defendant company's boom?

A. It was not anywhere near. It caught on the west of the line of piles marked Miller's boom near the west bank of the river, and I should say there was no part of that tree within at least 150 feet of the line of piles indicating the east line of the defendant company's boom.

Q. Then what was there to prevent that drift passing to the east of that tree, between it and the east line of the defendant's boom? A. Shallow water.

Q. Between the end of the tree and the boom?

A. Yes, sir.

Q. But you say there was 150 feet of space between the end of the limbs and the piles?

A. Yes, sir, but the trend of the current would tend to set it over to the west shore. After getting to the Steamboat slough the current sets everything over to the west bank of the river.

Q. Why would that not scour out the bottom of the river?

A. Because the heavy tides and winds holds the water long enough to deposit a large part of the sediment. I would state further that at the time I spoke of having the men make an opening for boats at 109, that drift had caught on the large trees to which I referred and extended over to the bank of the river at about the point marked 98. That made it easy to open up the channel at 109, or make an opening so boats could get through on high water. This drift caught on to the big tree first referred to and then another tree or part of a tree caught on that and extended to the opposite bank of the river before it got down to defendant's piles, and then more drift accumulated north of that.

Q. If the current tended to the west at the point opposite 109, as you say, why didn't you make an opening to the west, rather than to the east?

A. Because it would cost a great deal more money and take more time.

Q. Was there any drift below that tree?

A. Yes, sir, there was drift down here, extending to 178.

Q. Then the tree that caught at the point of the arrow south of 109 was not the first tree that caught to form that drift? A. No, sir.

Q. Where was the first tree lodged that caused a jam?

A. It was down in the neighborhood of 178, but I cannot give it definitely.

Q. What kind of a tree was that?

A. I was not down on that tree. I do not think it was a whole tree. My recollection is that there were three trees. I think there was a big part of a tree down here that I was not on and another one, I should say, about opposite the figures 178, and another one opposite the second arrow, and then the one I have described more fully. These were all full trees with their limbs and roots.

Q. How near to the east line of defendant's row of piles did the tree come that lodged at the point 178?

A. I do not think within 200 feet of it.

Q. And the channel between the east line of defendant's piles and what is marked Miller's boom at the point 178 is about 200 feet wide? A. Yes, sir.

Q. Then that tree lodged west of the channel at 178?

A. No, I do not think you understand me. A good part of the surface or the bed of the Nooksack River, from point 109 down to 189, would be exposed at low water, the channel of the river, so called, being a good deal to the west of that. In other words, the east line of the defendant's boom being dry at low water and the water of the Nooksack River being considerably to the west, so that when the tide is out no drift or anything would ever tend to go over where the line of piles is, but keep to the west where there is more water. For that reason, nothing could ever get over on the piles except at high water.

Q. Is that true of the condition at 189?

A. At different points all along from 109 to 189.

Q. I ask if that is true as to 189?

A. I cannot say as to that exact point.

Q. Is it true from 189 to 178?

A. I would not say that all is, but the most of it.

Q. If that is true, why were not the piles in Miller's boom removed at 178 down to and below 189, so as to allow boats to go in the channel.

A. I do not think that the piles are not removed below the point 178. The usual course of boats coming in the trip has been to follow where there was the most water, which would be after coming into the trip, taking a northwest course to the point designated by piles, the second removed from No. 1 in the figures 1, 2, 3, 4, 5, 6.

Q. Which way? A. East.

Q. State that again.

A. About the middle of the lower line of piles marked Miller's boom.

Q. Then what?

A. Then follow up to the west line of piles marked Miller's boom. Anywhere between that and the place marked tide flats, where they could get the most water.

Q. Where they could get the most water?

Redirect Examination by Mr. Newman.

Q. In the summer of 1890, when you testified the defendant's boom was constructed, was there any other boom constructed and existing at that time at the mouth of the Nooksack River?

A. Yes, sir, the Nooksack boom.

Q. How is that designated on defendant's Exhibit "1"?

A. As Miller boom.

Q. Do you know anything as to the condition of the mouth of the river relative to drift and snags being located there at the time of the construction of the Miller boom?

A. I do not know very much about that.

Q. You were not there at that time?

A. No, sir.

Q. Has the defendant company made any effort to remove the drift which is in the mouth of the river at this time?

A. Nothing since the time I spoke of opening the channel at 109. Through our lease to Elery Rogers, he is doing some work over there.

Q. When you refer to the figures 109 do you mean the point indicated by the opening at the upper end of the piling, marked D-E? A. Yes, sir.

Q. Do you know what the 109 means that you refer to?

A. It means an opening 109 feet long or wide.

Witness excused.

ELERY ROGERS called.

Direct Examination by Mr. Newman.

Q. You reside in Whatcom county? A. Yes, sir.

Q. How long have you resided here?

A. About nine years.

Q. What business have you been engaged in during that time?

A. In the mercantile business first.

Q. Whereabouts? A. At Whatcom.

Q. For how long? A. About a year.

Q. When was that?

A. It was in 1889, I think; about 1888 or 1889.

Q. What business after that?

A. I was in the real estate business for a year or two.

Q. And after that?

A. Then I was county treasurer of Whatcom county.

Q. More than one term? A. Two terms.

Q. What business are you engaged in now?

A. In the sawmill and shinglemill business.

Q. Where is the mill located?

A. At the village of Marietta.

Q. How long have you owned and conducted that mill?

A. About two years.

Q. Where do you get your supply of logs?

A. Mostly from the Nooksack River.

Q. Through defendant's boom? A. Yes, sir.

Q. Are you acquainted with the mouth of the Nooksack River, its character, the flats there, the depth of the water, etc.?

A. Quite well acquainted with it lately, yes, sir.

Q. How have you acquired such knowledge?

A. In conducting the boom.

Q. How long have you been conducting the boom?

A. Since the latter part of 1894.

Q. Are you the Mr. Rogers referred to by Mr. Cowgill as the lessee of the boom? A. Yes, sir.

Q. State whether or not there is any drift or brush at the mouth of the Nooksack River at this time.

A. Yes, sir, there is brush there at the mouth of the river now in places.

Q. State whether or not it so obstructs the mouth of the river as to prevent steamboats passing up.

A. Steamboats have passed up recently and could pass now at a good stage of water.

Q. During high tide?

A. Yes, sir, during high tide; I think steamers such as go could go. There was one there a short time ago.

Q. Do you know anything about Captain Kilcup having trouble there?

A. Yes, sir, he made two trips up recently. On the last trip he remained there several days aground.

Q. Indicate where he was aground on defendant's Exhibit "1."

A. It was on these flats near the trip—above the trip.

Q. To the east of the piles?

A. Yes, sir; considerably to the east of the piles. He got aground by going too far to the east. The tide was going out very fast.

Q. Are you familiar with the character and the location of the drift which is at the mouth of the river at this time?

A. Quite familiar; I have been there very frequently during the last three months; sometimes every day.

Q. State whether or not any of it is lodged against the piles. A. None of it, I think.

Q. Can you tell what caused the lodgment of that drift there?

A. It is caused by large trees coming down with their

roots and catching in the shallow water and being stopped by the tide and forming a jam.

Q. State whether or not, in your judgment, the boom of the defendant was the cause of the drift lodging in the place in which it did lodge.

A. I do not think it was. I think it would have lodged just the same or more so. If there was no work done there it would accumulate more than it does.

Q. State whether or not, in your judgment, the maintenance of that boom is an injury or a benefit to the navigation at the mouth of the Nooksack River.

Mr. Brinker. We object, as the witness has not shown he has any knowledge sufficient to give an opinion.

Q. Answer the question. (Question read.)

A. I think the operation of the boom is a benefit to the navigation.

Q. State what you have done, if anything, as lessee of the boom, in the way of removing any snags or drift at the mouth of the Nooksack River.

A. We have done about $400 worth of work and powder in clearing out the drift since November.

Q. Since you went there? A. Yes, sir.

Q. Was the delay referred to by you of Kilcup in getting his boat up occasioned by the boom of the defendant?

A. No, sir, not at all. He was entirely outside of the boom, and would have got along all right if he had been a little quicker in getting down on the tide. There was no boom in his way.

Q. Have you any knowledge or acquaintance of the

character and amount of business transacted on the Nooksack River by steamboats in the last six or seven years?

A. Yes, sir, somewhat.

Q. How have you acquired this knowledge?

A. By observation and acquaintance with the officers of the boats and having done business myself.

Q. When in business in New Whatcom did you do any business in receiving goods down the Nooksack River?

A. I bought some goods that came down; a very little.

Q. Were you generally acquainted with the volume of business transacted? A. Yes, sir.

Q. And since that time have you any knowledge as to the amount of business and number of boats passing up and out of the Nooksack River? A. Yes, sir.

Q. What has been the volume of business so transacted —the value of it—during the last year?

A. Very light; almost nothing for the last two years.

Q. Do you know why?

A. I think it because of the increased facilities of transferring freight. The good plank roads and railroads.

Q. Do you know whether or not there is any considerable demand for steamboat traffic on the Nooksack river?

A. I think there is very little.

Q. Are you able to form an estimate as to the value of the products transported on the Nooksack River during the last four or five years?

A. It would be an approximate value. I don't think the value would exceed $4,000 or $5,000 of any year of the gross tonnage.

Q. During the last five years?

A. Yes, sir, per year. Not so much in the last year or so.

Q. Would it, at any time, amount to $3,000?

A. I do not know as it has. I do not think it has, but it could not possibly be more than the other figures.

Q. What would you say as to the volume transacted during the past two years?

A. Very little. I do not know of but two boats' loads in the last year; one was a light load of lumber and the other broom handles.

Q. Are you acquainted with the business done on the Nooksack River and acquainted with the volume of business of the Bellingham Bay Boom Company in the way of handling sawlogs coming out of the river?

A. Yes, sir. The logs we have ourselves amount to about 600,000 feet.

Q. What, in your judgment, is the river more valuable for as an outlet for the timber product or the transfer of goods by steamer?

Mr. Brinker. We object as irrelevant and immaterial.

A. I think it would be far more valuable for saw logs.

Q. Can the timber coming down the Nooksack River in the way of logs be driven, secured, handled and taken to the mills without a log boom located at the mouth of the river? A. No, sir, it could not.

Cross-Examination by Mr. W. H. Brinker.

Q. At the time Captain Kilcup was stranded on the tide flats, as indicated by you, what was the condition of the river inside of the defendant's boom from the mouth of the river down to the trip?

A. I do not think there was water enough to carry the boat down if the drift was removed, but there was drift that prevented his following the old channel.

Q. There was drift inside the channel that he could not get through?

A. Yes, sir, there was a section of it—yes, sir, two sections of it.

Q. So he was compelled to attempt to pass on the outside; I mean to the east of the defendant's boom?

A. Yes, sir, we opened a channel for him there, thinking it would be more easily opened. He made one trip through it, but on his return trip he got aground.

Q. He was outside of the piles because he could not go inside on account of the drift?

A. He didn't object to going there, but was very near outside when he stranded.

Q. But it was above the trip?

A. Yes, sir; we had a section of logs that he intended to take over to us; that probably accounted for his being so far outside.

Q. Were you acquainted with that river before the boom was erected?

A. I had been over there, but was not very well acquainted with it.

Q. How long before the boom was constructed had you been there?

A. I was there soon after coming to this country, some 8 or 9 years ago.

Q. What was the condition of this channel of the river that runs through the boom, at that time, as to drift and jams?

A. My recollection is that I went up in a rowboat and went up this other slough.

Q. Steamboat slough?

A. McDonald's slough, and I think the steamboats usually followed that slough.

Q. Answer my question; I asked you what was the condition of the channel that runs through the boom at that time?

A. I was not acquainted with it at that time.

Q. If there had been a large drift you would have seen it? A. No, sir, I think not.

Q. What obstructed your view?

A. There it is half a mile across; yes, I think it is more than half a mile.

Q. Half a mile across there? A. Yes, sir.

Q. But the tide flats are level?

A. Yes, sir, with a small island between them.

Q. Is that island high? A. No, sir.

Q. If there had been a jam you would have seen it?

A. No, sir, I do not think so.

Witness excused.

H. M. WELLMAN called.

Direct Examination by Mr. T. G. Newman.

Q. State your name. A. H. M. Wellman.

Q. What business are you engaged in?

A. In engineering and surveying.

Q. How long have you been engaged in that business? A. For the past six (6) years.

Q. How long have you resided in Whatcom County?

A. Between 11 and 12 years.

Q. Where have you lived during that time?

A. In Lynden and Fairhaven.

Q. State whether or not at any time you made any survey for the Bellingham Bay Boom Company relative to the location of its boom?

A. I did.

Q. At what time were you so engaged?

A. During June, July, and August, 1890.

Q. June, July, and August of 1890?

A. Yes, sir.

Q. And what did you do during that time, and where was your work performed?

A. It was performed at the mouth of the Nooksack River.

Q. What was the nature of your work?

A. I surveyed the flats, taking sufficient notes to plat the various channels and noting the depth of most of them, and also determining where the piles should be driven.

Q. Examine Defendant's Exhibit "1" and state whether or not you prepared that and when?

A. I prepared that some time in 1890.

Q. Do you recollect when?

A. It was some time after August.

Q. And from what data did you prepare that map?

A. From notes taken in the field.

Q. At the time referred to by you?

A. Yes, sir.

Q. And from those surveys made at that time?

A. Yes, sir.

Q. State whether or not that is an accurate map of the location and condition of the boom and tide flats and the waters at the mouth of the Nooksack River.

A. It is at that time.

Q. What was the stage of water represented on here at that time?

A. You mean in reference to the river?

Q. The tide.

A. I do not know what you mean.

Q. At what tide is this represented?

A. At low tide.

Q. State what the figures 181 at the trip marked "F-G" mean.

A. The length of the trip for the passage of boats.

Q. That signifies feet? A. Yes, sir.

Q. And the other figures along the east line of defendant's boom above the trip indicated by 189, 119, 109 etc.; what does that indicate?

A. Also feet, as indicated by the index.

Q. What is this opening at the upper end of the east line, marked "D-E" of 109 feet in width?

A. The idea of that at the time was that any steamers coming at high tide might pass over the flats and enter the channel at that point, instead of at the trip at "F-G."

Q. Have you any acquaintance or knowledge of the Nooksack River, its branches and tributaries?

A. I have.

Q. Have you any knowledge of the nature of the country which it drains and the amount of timber on the Nooksack River and its branches which are tributary to that river? A. Yes, sir.

Q. And which timber will come out by way of the river? A. Yes, sir.

Q. State how you acquired such knowledge.

A. By trips up and down the river and through the country adjacent thereto, and I have taken several trips up the forks of the river purposely to become acquainted with the timber and general character of the country and also in cruising some timber.

Q. Are you competent to cruise timber?

A. I have been considered so.

Q. Have you done considerable in that line?

A. Yes, sir.

Q. What forks or branches of the Nooksack River have you examined as to the quantity and character of the timber?

A. The south and north forks.

Q. Have, you, from the knowledge thus acquired made any estimate as to the amount of timber along these forks and branches of the Nooksack River, which is tributary to the river and its branches?

A. I have.

Q. What, in your judgment, is the amount of that timber?

Mr. Brinker. We object as immaterial and irrelevant.

A. Three billion feet or more.

Q. Have you any acquaintance with the mouth of the Nooksack River?

A. I have had up to within the past two years.

Q. How was this acquaintance formed; what knowledge have you?

A. At the time of the survey I was all over the flats on foot. Previous to that time I had occasion to go up the river in small boats several times, and was caught there quite often when the tide was out and had difficulty in getting into the stream, and have helped to hunt for the channel.

Q. Did you ever go up on steamers prior to the erection of the boom? A. Yes, sir.

Q. Do you know whether the steamboats experienced any difficulty in navigating the river?

A. I do not think we ever went up without our experiencing difficulty.

Q. Occasioned by what? A. Drift and low tide.

Q. Can a steamboat pass up or down the Nooksack River at any other than high tide?

A. Whenever I have been there they could not, unless the tide was at least half full.

Q. What was the occasion of the drift you have referred to at the mouth of the river prior to the construction of the boom?

A. The timber which came down the river and lodged at its mouth.

Q. Lodged for what reason?

A. After the timber comes down to the mouth of the river the prevailing wind which it encounters is south

east, or against the current of the stream; also the sediment of the river is deposited, and the tide coming in, there is not sufficient current to carry it into the bay, but it lodges on the flats.

Cross-Examination by Mr. Brinker.

Q. At the time you made the survey, Mr. Wellman, did you take the soundings in the various channels indicated on this map, Defendant's Exhibit "1"?

A. I did in nearly all of them.

Q. Have you marked them anywhere on this map?

A. I do not see that I have.

Q. Where was the main channel at that time; the Steamboat channel?

A. In the channel between the red lines adjoining the piles of the boom.

Q. Did you see any drift there at that time when you made the survey?

A. Not in the channel.

Q. The channel, you say, runs down between the red lines of the piles of the boom, but after it passes below the red lines where does it go?

A. There seems to be about the same channel passing through the trip that there was to the left.

Q. The channel seemed to be divided about the trip?

A. Yes, sir.

Q. And one went down to the west and south?

A. Yes, sir.

Q. Have you any recollection now of the depth of the water down the channel between the red lines on this map?

A. At the point where the channel is marked to be 115 feet in width it was eight (8) feet in depth. Where 178 feet in width, it was five and six (5 and 6) feet: down near the trip, when the tide was out, it was about three (3) feet.

Q. That is the point marked "dolphin"?

A. Yes, sir.

Q. Go on.

A. After passing below that in either of the channels it was less than that; down to eight (8) or ten (10) inches at the lower end of the flats.

Q. These depths were obtained at low tide?

A. Yes, sir.

Q. Were the "dolphins" there at the time you made your survey?

A. Yes—no, I will not be sure about that. They were there at the time I made the survey, or else in the month of September or October.

Q. Afterwards? A. Yes, sir.

Q. What is a "dolphin"?

A. They were piles placed there and were called "dolphins" by the men on the pile-driver, and I called them so.

Q. They are a cluster of piles?

A. It is usually so, but not necessarily.

Q. Then you are not sure whether or not those "dolphins" were there when you made the survey?

A. No, sir, but I saw them there that fall. Yes, they were there when I made the survey, I am sure.

Q. You recollect that now?

A. Yes, sir, they were there.

Q. Do you know anything of the action of the water and the accumulation or washing out of sand and mud in streams and in situations of the character as indicated on this map?

A. You mean in reference to these piles?

Q. Generally, so as to form an opinion.

A. I think so.

Q. Would the presence of the "dolphins" just to the west of the trip cause the water at that point to shoal or scour out?

A. I do not think that the "dolphins" in there would do either.

Q. There would not any sand accumulate above the piles? A. No, sir, none above.

Q. Would there any below in the opposite direction of the current? A. There might for two feet.

Q. Where did you meet a drift in going up the river on steamboat?

A. Through the channel marked old channel now, filling in almost down to McDonald's wharf.

Q. In making that trip was McDonald's touched on the way?

A. I believe I stated I made several trips; sometimes it was and sometimes not.

Q. Did you always go through this old channel?

A. Yes, sir.

Q. You never met with an obstruction in the channel that runs through the boom while you were on the steamboat? A. No, sir.

Q. When you made a survey was there any drift in

this channel which runs through the boom down to the trip?

A. There was none in the channel. There was what was called Miller's boom there and there was drift and logs inside of that. The west side of that boom was really bounded by the shore line, and this drift and logs were deposited on the flats, being driven back by the winds and tides.

Q. To the west of the line of piles marked Miller's boom? A. Yes, sir.

Q. Did you notice any other drift there at that time?

A. I did not.

Q. Do you know anything about the value of farm products that have been shipped out on that river for the past two or three or four years?

A. No, sir, not since that time.

Q. Prior to that time?

A. Yes, sir, I used to go down on the steamers and the principal products was hay from the Matz place and apples loaded at Ferndale.

Q. Has the produce increased or decreased since then?

A. I do not know.

Q. Have the settlements increased or decreased?

A. Increased.

Q. They have increased? A. Yes, sir.

Q. And have the products increased or decreased?

A. I do not know.

Redirect Examination by Mr. Newman.

Q. Counsel asked you whether the products raised

along the river have increased or decreased; you said you did not know? A. Yes, sir.

Q. Do you know whether or not the products transported by steamboats on the Nooksack River have increased or decreased since that time?

A. I cannot say that I know positively, but I do know in my own mind, for the steamers do not go as often as they used to go.

Q. Do you know why?

A. Because these products are brought out by rail and over plank roads.

Q. At the time referred to by you did you have any railroad or plank road connection with New Whatcom?

A. No, sir.

Witness excused.

Mr. Newman. Defendant offers in evidence its exhibit heretofore identified and referred to as Defendant's Exhibit "1," and also offers in evidence a map of the Nooksack River, purporting to be from survey made by D. B. Ogden, assistant engineer, October, 1894, marked Defendant's Exhibit "4."

D. McKINNON called.

Direct Examination by Mr. T. G. Newman.

Q. What is your age? A. Forty-one.

Q. Where do you reside? A. In Fairhaven.

Q. This county? A. Yes, sir.

Q. How long have you resided in this county?

A. Nearly six (6) years.

Q. What business are you engaged in?

A. Lumber.

Q. Lumber? A. Yes, sir.

Q. What is the nature of the lumber business?

A. Lumber inspector.

Q. State lumber inspector? A. Deputy.

Q. How long have you occupied that official position?

A. Since April 27th, 1891.

Q. Have you had any experience as a timber cruiser?

A. Yes, sir.

Q. For what length of time?

A. Over thirteen or fourteen years ago I commenced.

Q. Have you followed that business to any extent since?

A. Most of that time; exclusively for the past six years.

Q. Have you had any experience as a log-scaler?

A. Yes, sir.

Q. Over what length of time has such experience extended? A. It covers about that period.

Q. Have you any acquaintance with the Nooksack River and its mouth? A. Yes, sir, some.

Q. State what knowledge you have acquired and how relative to the Nooksack River.

A. In 1891 I was about a week, I think, scaling logs in the boom at the mouth of the Nooksack River, and also at the same time I scaled the logs of a certain brand from Nugent's Ferry down to the boom.

Q. Since the construction of the boom, state how frequently you have been over to the boom.

A. I do not think I have been over half a dozen times in all.

Q. How long have you stayed on these occasions?

A. At one time I stayed a week and at another time three days.

Q. Have you at any time observed any drift at the mouth of the river? A. Yes, sir.

Q. What was it composed of?

A. Of trees, brush and logs all mixed up.

Q. State what was the occasion of said drift lodging there.

A. It is shallow water and trees catching on the bars.

Q. State whether or not at any time you observed any drift, such as referred to by you, having lodged against and stopped by any of the boom sticks or piling of the defendant. A. I did not see any.

Q. Where was the drift lodged relative to the boom?

A. It was towards shore and on the shore close to the Reservation. Most of it was on the upper end and along the shore.

Q. Have you any knowledge of the territory and the timber along the Nooksack River, its branches and tributaries?

A. With the exception of the north fork and the middle fork I have.

Q. State what examination you have given the south fork and the main bed of the river relative to acquiring information as to the quantity of the time tributary thereto.

A. I have for the past six (6) years made estimates of

several lands throughout this country, and I should judge there was about two billion feet of timber in these lands I have been over.

Q. And that is exclusive of any timber situated on the north or middle fork? A. Yes, sir.

Cross-Examination by Mr. W. H. Brinker.

Q. Were you at the point where the boom is constructed prior to 1890? A. No, sir.

Q. Were you there just before the boom was built?

A. No, sir

Q. You do not know anything about the condition there prior to the building of the boom?

A. No, sir, nothing whatever.

Q. You do not know what caused the shoal places that the trees lodged on?

A. The shoals are caused principally in the fall of the year when the water is high and the drifts are coming down. The winds blow towards the shore and the winds so blowing and with high tides forms a cushion that drives the logs and the current up the stream.

Q. How about the formation of bars in the channels?

A. That is the cause; the same is true up the river.

Q. Isn't it true that a bar is only created at the point of the low water where the fresh water meets the salt water?

A. Yes, sir; it is caused by high tide and winds coming against the heavy body of water coming down the river.

Q. When you first went up to the boom was there any drift in the boom?

A. Yes, sir, considerable.

Q. Was there any drift down between the red lines indicating the Miller boom and the defendant's boom?

A. No drift to speak of above the trip at that time; of course below there was considerable.

Q. And above the trip?

A. Nothing to speak of, for the men were continually cleaning out the drift.

Q. You saw them? A. Yes, sir.

Q. There is considerable volume of water that pours through that stream in to the bay?

A. Yes, sir.

Q. During all seasons? A. The most in the fall.

Q. When there are freshets? A. Yes, sir.

Q. But isn't there a large volume of water pouring through the river into the bay?

A. You cannot call it a large volume. In the river above Everson bridge I have seen it 1½ feet in places.

Q. Isn't it a fact that that water that comes down the river is enough to destroy the toredo in Bellingham Bay?

A. Yes, sir.

Q. At all seasons of the year? A. Yes, sir.

Q. And if that river was shut off and the water taken into another channel and another bay it would be a material detriment to this bay?

A. I could not say whether that is a fact or not.

Q. Isn't there sufficient volume of water there in that river to carry all the drift that would come down there out into the sea if it was not for the boom?

A. Providing there was no obstruction to the volume of water by means of tide and winds. If there was no boom in existence it would stop it.

Q. The tides and the winds are about the same since the construction of the boom as they were before?

A. I presume they are.

Q. You know of no extraordinary revolution of nature? A. No, sir.

Q. Then why has not drift piled up there during all of these years?

Mr. Newman. We object as not proper cross-examination.

Q. How is that?

A. I do not know anything that occurred in former years.

Q. You have just expressed an opinion if there were no boom the drift would form there.

A. Yes, sir, that is my opinion.

Q. And you have no opinion when I ask you why it didn't accumulate before? A. What?

Q. (Read the question.)

A. I have no personal knowledge, but there was a drift in former years.

Q. Do you know there was any drift?

A. No, sir.

Q. But you testify there was no drift between the lines of these piles?

A. No drift to speak of. The men were continually keeping the channel open to let the logs out and letting the steamboats pass up and down.

Mr. Brinker. I want to object to his testimony as to the volume of logging industry.

Witness excused.

GEORGE A. BLACK called.

Direct Examination by Mr. T. G. Newman.

Q. Where do you reside? A. In Fairhaven.

Q. What is your age? A. Fifty-four.

Q. How long have you resided in Whatcom County?

A. Over six (6) years.

Q. Where did you reside before coming to Whatcom County? A. Last in Idaho.

Q. What business were you engaged in in Idaho?

A. Mining.

Q. How long were you so engaged?

A. Seven (7) years.

Q. Where did you reside prior to that?

A. Utah.

Q. What part? A. Salt Lake City.

Q. How long were you there?

A. Twelve (12) years.

Q. What business were you engaged in at that time?

A. From 1870 to 1876 I was secretary of the territory and until 1882 in mining.

Q. What business have you been engaged in since your residence in this county?

A. I was for something over two years agent of the land company, and since have been dealing in real estate, except for about a year I was receiver for the Puget Sound Loan, Trust & Banking Company.

Q. Have you any official connection with the defendant company? A. I have.

Q. What is its nature and how long has it existed?

A. I am a stockholder, trustee and vice-president of the company, and have been so interested since the organization of the boom company.

Q. When was it organized? A. In 1890.

Q. At what time?

A. Early in the year; I think in June.

Q. When was its boom at the mouth of the river constructed?

A. The construction was commenced at the mouth of the Nooksack River in June, 1890, and continued until the fall of 1890, when completed.

Q. Do you know what date?

A. I do not know, but I think it was along in September some time.

Q. You are not clear as to the date?

A. I know we commenced there along early in 1890 and completed it, and commenced the operation of the boom in the fall of 1890.

Q. Have you any acquaintance with the mouth of the Nooksack River where the boom is located?

A. I have.

Q. How have you acquired such acquaintance?

A. By virtue of my interest there.

Q. Have you been there frequently since the construction of the boom? A. I have.

Q. What observations have you made, if any?

A. I have been all over it at high tide and low tide, afoot and in a boat, going there for the purpose of investigating the work and for glancing at the work in times of trouble and in times of peace.

Q. Have you ever observed any drifts at the mouth of the river? A. I have.

Q. Have you ever observed any such lodged against or stopped by any of the piling or boom sticks of the defendant company? A. I never did.

Q. What occasioned such lodgment of drift at the mouth of the Nooksack River?

A. Every drift I have ever seen form in the river was occasioned by the lodgment of trees upon bars in the river away from and entirely separate from any boom sticks or piling owned by the boom company.

Q. What steps, if any, have the company taken relative to keeping the channel of the river open and affording facilities for water craft to enter the river?

A. We have always done everything in our power and spent thousands of dollars for that purpose alone.

Q. How was it expended?

A. In labor, powder, material, etc.

Q. Have you ever personally given any instructions relative to the conducting of the trip in affording facilities for the passage of boats? A. I have.

Q. In what year?

A. I had, for two years, the honor of being president, and while acting in that capacity I always instructed the men in charge of the boom to be obliging to steamboat men in going in and coming out of the boom and in keeping the channel clear for them at all times when in their power.

Cross-Examination by Mr. W. H. Brinker.

Q. Where is this drift now?

A. That I could not state definitely; I have not been

there for six or eight months, having had a bad leg and could not walk.

Q. And where when you were last there?

A. It was about the church and below the church. I should think (indicating) it was along in here.

Q. Along about the figures 178?

A. Yes, sir; there is where it usually formed.

Q. About how far does it extend up and down the channel?

A. I have seen it a quarter of a mile long.

Q. How long was it the last time you saw it?

A. We have removed it so many times that I could not tell you the condition it was in when I last saw it.

Q. Were you there when the survey was made?

A. No, sir.

Q. Were you there when the piles were being driven?

A. Yes, sir.

Q. Where was the drift then, if any?

A. I do not think there was any drift there then.

Witness excused.

Mr. Newman. Defendant rests.

Mr. Brinker. I would like to open this case as soon as I return from Spokane for the introduction of certain testimony.

Friday, May 31, 1895.

CASE REOPENED.

JACOB MATZ, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. Where do you reside?

A. Above Ferndale; the postoffice is Enterprise.

Q. On the Nooksack River? A. Yes, sir.

Q. How far above its mouth?

A. About 8 or 10 miles.

Q. How far from New Whatcom?

A. By water I suppose it would be the 8 or 10 miles and the distance across the bay, but I do not know how far that is; 6 or 7 miles.

Q. About 14 miles by water?

A. Yes, sir, by bay and river?

Q. Fourteen miles by bay and river?

A. No, about 15 miles, at least, I guess, by bay and river.

Q. How far by road?

A. By road it is 13½ miles.

Q. What is the condition of the road between your place and Whatcom?

A. As far as Ferndale from Whatcom it is a good plank road, and from Ferndale out to my place is as bad a road as can be found in Whatcom County.

Q. From your place to Ferndale it is 5 miles?

A. To reach my farm it is 3½ miles and it is ¾ of a mile to the Nooksack River.

Q. You live up the river from Ferndale?

A. Yes, sir.

Q. And this road is along the river back to Ferndale?

A. No, sir, this road is not on the river bank, but it is back from the river; it runs due north.

Q. What is the character of the country—of the land through which this road passes; the general character?

A. A good deal of it is bottom land and mucky.

Q. Not good for a road? A. No, sir.

Q. Much rain there? A. Yes, sir.

Q. During what seasons do you find this road to be bad?

A. In fact it is bad all the year round.

Q. State what is the size of your farm under cultivation.

A. About150 acres under cultivation.

Q. What is the value of the products raised on your farm for export?

A. I judge my exports above my wants at home are about $5,000.

Q. About $5,000? A. Yes, sir.

Q. What do those farm products consist of principally?

A. There is hay; that is my chief product, and grain and oats next.

Q. About how many tons of hay will you raise this year?

A. I figure, as things look now, for about 175 to 200 tons of hay to sell.

Q. How much oats? A. 3,000 bushels.

Q. How many tons of hay will you raise on your place? A. About 300 tons.

Q. About 300 tons? A. Yes, sir.

Q. And you may sell the whole 300 tons?

A. I may; I have some old hay.

Q. What is the price of hay and oats?

A. It may be $9.00 and it may be $10.00 and it may be less.

Q. And oats?

A. I sold the last at a cent a pound—$20.00 a ton.

Q. Where is your market for the hay?

A. Here at New Whatcom.

Q. How is the most convenient way for you to deliver your produce? A. By navigation.

Q. By what river? A. The Nooksack River.

Q. Have you ever shipped any hay? A. Yes, sir.

Q. How have you shipped it? A. What?

Q. How have you shipped it? A. By boat.

Q. Explain the method of loading the boats when you have a large amount of hay to ship.

A. I have loaded a scow, putting on 25 tons at a time and filling the boat with all they could put on it.

Q. Is that practical to deliver hay here by wagon?

A. It would not be; no, sir.

Q. Have you a general knowledge of the number of persons living along the Nooksack River in your vicinity?

A. I know pretty near, I think.

Q. From your knowledge of the character of the farms along that river, give a general estimate of the value of the farm products that are produced, if you know such value.

Mr. Newman. We object, as no foundation has been laid.

A. I know there are a lot more good farmers outside of me.

Q. Name some.

A. Mr. Lynch; he ships a good deal of hay.

Q. Does he raise as much as you do?

A. No, sir, I do not think he does.

Q. About how much does he raise?

A. He raises about 100 tons of hay. Mr. McCue raises a lot of hay; he must get 200 or 300 tons on his place; John Matz he comes pretty close to me in products, and there are several below Ferndale that I do not know what they do ship, but they ship considerable. There are Slaters and Evans and Manning; they have been shipping considerable when they could get a boat.

Q. Is there any line of wagons that do general hauling; that carry on business over that plank road?

A. I could not say, I know of none.

Q. What are the freight rates over the river to New Whatcom on hay; about how much a ton?

A. It cost me about $2.00 a ton; that is the wharfage included.

Q. Without the wharfage?

A. $1.75 a ton.

Q. Are they clearing and improving the farms along that river? A. They do, yes, sir.

Q. Extensively?

A. According to their means; I have added myself, last year, 30 acres.

Q. Is the farming interest increasing along the river?

A. Yes, sir, every day and every year.

Q. Is all the land along the river settled, do you know?

A. It is taken up but it is not settled on every quarter section; in my locality it is well settled.

Q. Are nearly all the homesteads occupied?

A. They are occupied and improved in my vicinity.

Q. Is all the land along the river good for agricultural purposes? A. It is good.

Q. What is the condition of the lumber along that river?

A. The timber is poor and very scattering and a good deal of it is fire-killed, and it will be more fire-killed every year.

Q. Did you ever pass through the boom at the mouth of the Nooksack River?

A. I did two years ago.

Q. Did you have any trouble there?

A. Yes, sir.

Q. Just state what you did.

Mr. Newman. We object as incompetent, as not proper rebuttal, but direct, the plaintiff having gone into the question of this subject on his direct examination.

A. I came down on the steamer and I had hay aboard and they had to go right through the opening crossing the current right square, and they ran into the piles and got the wheel fast and had quite a job to get through, and they had to leave the scow and unhitch it and then tow it out.

Q. If the piles had not been there would the river have been unnavigable?

Mr. Newman. Same objection.

A. They could have gone out all right if the piles had not been there.

Q. State what effect, if any, the erection of this boom has had on the commerce of the river, if you know.

Mr. Newman. We object; no foundation has been laid.

Q. First, do you do any shipping up and down the river? A. Not at present.

Q. Have you done any?

A. I have done it when we could get boats.

Q. Are you familiar with the incoming and outgoing of the steamers and the character of the business?

A. They have carried considerable freight up and down.

Q. State, then, what effect, if any, this boom has had on the steamer commerce on the river.

Mr. Newman. Objected to for the reasons heretofore assigned.

A. The boatmen always complained about the river and had trouble to get in.

Mr. Newman. We object as not responsive and hearsay and move to strike.

Q. Answer the question; whether the navigation has improved since the erection of this boom or not, if you know. A. It has gone down.

Q. State whether or not there has been any work done on this river in improving its navigation.

Mr. Newman. We object as incompetent, irrelevant and

immaterial, not proper rebuttal, and calling for a conclusion of the witness, the witness having shown no knowledge whatever as to the improvements about which he is interrogated.

A. There has been government work done on that river.

Q. Explain what has been done.

Mr. Newman. We object as incompetent and not rebuttal testimony.

Q. Answer the question.

A. The government has sent a snag boat up the river and cleared the river from obstructions and they pulled out snags and stumps.

Q. How far has the boat gone up?

A. As far as Lynch's.

Q. Has that improved the navigation of the river?

Mr. Newman. Same objection.

A. Yes, sir, it has.

Q. How many times has the boat been up the river?

Mr. Newman. Same objection.

A. Three times I think; and maybe more.

Q. Did they do any great amount of work there?

A. Yes, sir, considerable work there.

Q. How long does it take a boat of the ordinary speed to go from Lynden to New Whatcom by the water route?

A. I didn't pay attention to how they did run; generally they went up one day and down the next.

Q. In the course of the day?

A. Yes, sir, and laid over overnight.

Q. Can you form an approximate idea of the amount of hay that is tributary to this river?

A. I think there—

Mr. Newman. Answer by yes or no.

Q. Can you form an approximate idea?

A. Yes, sir.

Q. Just state about what.

Mr. Newman. We object as incompetent, as direct testimony and not rebuttal, no foundation whatever having been laid.

Q. Answer the question.

A. What is the question?

Q. Just state about what amount.

A. I think there could easily be picked up 1000 tons of hay now if there was a way to get it down.

Q. After the hay crop comes in how much do you think there will be to get out?

Mr. Newman. We object as incompetent, irrelevant and immaterial.

Q. Answer the question; this additional crop; this new crop when it comes in, how much hay will there be on the river?

A. I think there could be that amount picked up this coming season all right.

Q. I will ask you if there are roads parallel with the Nooksack River suitable to accommodate the necessities of the farmers in your neighborhood?

Mr. Newman. We object as incompetent, irrelevant and immaterial and calling for a conclusion of the witness and not proper rebuttal testimony.

Q. I will withdraw that question; are you familiar with the roads in your neighborhood?

A. Yes, sir.

Q. Now, this map I show you is a map of the Nooksack River, marked Defendant's Exhibit "4." Explain on this map, if you can, the location of the roads between Ferndale and Whatcom.

A. I cannot find the line of the plank road to Whatcom; yes, that is this one.

Q. No, that is the Great Northern Railroad; here it is; now you have lived on this river how long?

A. For 22½ years.

Q. Are you familiar with the wants of the people on that river? A. I think so.

Q. I will ask you whether or not the people in this vicinity are dependent for an outlet principally on this river or on the different roads in your vicinity or neighborhood?

Mr. Newman. We object as incompetent, not the best evidence, and calling for a conclusion of the witness, as hearsay and no foundation has been laid.

Q. Answer the question.

A. They do depend on the river.

Q. The Nooksack River? A. Yes, sir.

Q. State whether or not in your opinion—state first if you know of any attempts being made to deliver produce to New Whatcom, or state the condition of the roads and satisfaction of taking the produce that way.

A. The people has to do it by land now on account of the boats not coming; they complain about the river.

Q. Is it satisfactory, the hauling over these roads?

A. Not to me it is not.

Q. And this plank road starts at Lynden, does it, for New Whatcom?

A. There is one, I think, to Lynden. One from Whatcom to Lynden, but I have not been over it.

Q. You depend on what to deliver your products?

A. On the Nooksack River.

Q. Entirely? A. Yes, sir.

Q. And is this road generally used by the farmers to haul produce on, this plank road, heavy produce?

A. They are using the roads of course as long as they cannot do any better.

Q. Above Ferndale on the river are there any plank roads?

A. Above Ferndale and across the river there are no plank roads.

Q. Above Ferndale on the north side of the river is is there any road parallel with the river for any considerable distance?

A. There is a road on the section lines running north by the river.

Q. How far does it run up the river?

A. It does not follow the river bank but a short distance until it reaches a point where it leaves the river; I guess the distance would be half a mile; no, it is not that much; one-third of a mile. Then it leaves the river and follows the line for about 2½ miles due north; no, it is 3½ miles due north. Then it drops half a mile and runs north again, how far, I do not know.

Q. And up the river from this last road where does that road go to?

A. That branches; one toward Blaine and another towards Lynden; east and west.

Q. How much shorter is it to go to Lynden and Ferndale by the river than to go to Lynden and Ferndale by the road? A. I could not figure on that.

Q. Some miles?

A. It is about 12 miles up the road from Ferndale to Lynden, I think.

Q. How far up the river?

A. From the looks of the map it would be considerable further, by the way the river turns.

Q. But as to the difference in distance you are not familiar? A. No, sir.

Q. Is there any road parallel with the river from Lynden to Ferndale alongside of the river?

A. There has been a road established but never opened.

Q. Who established it? A. The county.

Q. On the south side of the river is there any road from Ferndale to Lynden parallel with the river the whole way?

A. All the roads follow some certain lines until they come down to the Guide Meridian road.

Q. Is there any road parallel with the river on this side?

A. The people have some road to get in and out; some poor roads.

Q. Is there any general established county road, generally traveled by all the settlers on this side of the river?

A. Yes, sir, there are some roads to go with light travel.

Q. But there is no planked road? A. No, sir.

Q. No graveled roads? A. No.

Q. Is there any road suitable for heavy hauling, parallel with the river on either side? A. No, sir.

Q. Have these farmers that live up and down the river an outlet to the river?

A. The farms along the river there lie right on the river.

Q. Do they maintain warehouses along that river most of them? A. Some of them do and some do not.

Q. And all of them have outlets from their places right on the river?

A. Yes, sir, they have outlets on the river.

Cross-Examination by Mr. T. G. Newman.

Q. During your residence in this county have you constantly resided in the place where you now live?

A. Yes, sir.

Q. How far up the Nooksack River have you ever been?

A. I have been as far as Everson.

Q. Have you ever been up the river beyond Everson?

A. No, sir.

Q. Are you at all acquainted with the amount and character of the timber along the banks and tributaries of the Nooksack River above Everson? A. No, sir.

Q. Then when you state that the timber along that river is poor and killed by fire you refer to that timber which is on the lower part of the river below Everson?

A. In my locality.

Q. But you do not mean to say anything about the timber on the upper part of the river about which you do not know anything? A. No, sir.

Q. And the timber you refer to is situated upon the lowlands in the valley that was particularly adapted to agriculture? A. Yes, sir.

Q. You passed through the boom about two years ago; fix the date as near as you can.

A. It was about something like this time of the season, but I could not tell whether May or June.

Q. Ever been up there before?

A. Yes, sir, I have been through there several times.

Q. You testified about the roads in this county to a considerable extent. You said above Ferndale and across the river there are no plank roads; is that correct?

A. Yes, sir.

Q. What do you mean by that?

A. I mean a plank road half a mile for a stretch. I do not mean where there is a little bridge or stretch they are compelled to plank. I do not call that any plank road.

Q. Don't you know of the plank road that extends from the city of New Whatcom to the town of Lynden or near there, called the Guide Meridian road?

A. That is—

Q. Just answer that question; do you know that road?

A. I know the Guide Meridian for six miles has been planked some years ago and I heard of it being extended to Lynden.

Q. Then you know there is a first-class plank road, called the Guide Meridian, that extends directly from Whatcom to Lynden?

Mr. Robertson. We object as calling for a conclusion of the witness whether it is a first-class road or not.

A. On that plank road I have been to Weiser Lake, but that does not bring it to Lynden.

Q. Then you have only traveled that road to Weiser Lake between Lynden and Whatcom?

A. I have been as far as the lake.

Q. Then that is correct? A. Yes, sir.

Q. Then you do not know anything about that road as to its extension beyond Weiser Lake?

A. Only what I have heard from people.

Q. Then why did you testify that above Ferndale there was no plank road?

Mr. Robertson. We object as incompetent, immaterial and improper.

Q. Why did you so testify?

A. Because there is no plank road above Ferndale in my locality at all.

Q. That is not what you said; you never qualified your testimony that way.

A. That is what I meant.

Q. You meant, then, when you said above Ferndale and across the river there are no plank roads that in your immediate locality there are none.

A. Yes, sir.

Q. You didn't mean to say on the other side of the Nooksack River there are no plank roads in the county?

A. I have never seen any myself.

Mr. Robertson. Wait; we object on the ground that the question was whether or not there were any plank roads parallel with the river. We admit there is a road from Whatcom to Lynden.

Q. You have not been all over the other side of the county and investigated whether there are plank roads or not; on the other side of the Nooksack River?

A. A year ago last fall I went from my place on the other side of the river through Lynden to Everson, but I did not see any plank road on my journey.

Q. From where?

A. From my place to Lynden and from Lynden to Everson.

Q. There was no plank road the way you traveled?

A. No, sir.

Q. Your testimony in regard to the roads in this county is concerning the roads immediately in your vicinity that you know about? A. Yes, sir.

Q. And you didn't want it understood that your testimony applies to other parts of the county?

A. No, sir, I testified in my locality.

Redirect Examination by Mr. Robertson.

Q. Did you travel the ordinary public road between your place and Lynden? A. Yes, sir.

Q. And these are the roads you speak of being in the lowland and muddy? A. Yes, sir.

Q. Is there enough traffic to justify a boat running daily or every other day between Whatcom and Lynden?

Mr. Newman. We object as incompetent, as calling for an opinion of the witness and no foundation has been laid, the witness having not shown himself acquainted with the volume of business at this time or the necessity of steamboats on the Nooksack River, and it is not rebuttal.

Q. Answer the question.

A. What was the question?

Q. Is there enough traffic and trade on the Nooksack River to justify a boat running daily or every other day between New Whatcom and Lynden?

A. There is a lot of business that could be done and to be done on the river by boat; how often it would pay to run I could not guarantee; I could not say; I know what I have to be shipped myself.

Witness excused.

D. ROGERS, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. Where do you reside? A. Near Ferndale.

Q. How long have you lived there?

A. Fifteen years.

Q. What has been your business?

A. Mostly mercantile.

Q. How many stores in Ferndale?

A. At this time there are three.

Q. How many above at Lynden?

A. I do not know.

Q. Mr. Rogers, state what you know about the volume of traffic coming down the Nooksack River there as near as you know.

A. It would be considerable guesswork; I know there

used to be a great deal of business, but what at the present time I could not tell you. We have not had a boat very often now lately.

Q. Can you form any approximate idea as to the amount of commerce there? Can you explain it?

A. There are a great many farms on the river that depend on the river; it is inconvenient to go any other way, and it is expensive. Below town, as there is no bridge for miles, they have to haul to town, but they could load at their own door as Slater and Manning, who do a great deal of shipping, if they could only have a boat.

Q. Above and below Ferndale they have to go to town before they can strike the road or get across a bridge?

A. Yes, sir, they have to go to town; there is no other road until they get to Lynden. There is no crossing except the ferry between Ferndale and Lynden.

Q. How far do these parties live from Ferndale?

A. Some of these parties live below town near the Indian Reservation.

Q. On what side of the river?

A. On the north side, and there is no bridge, as I said, except at Ferndale.

Q. What is the distance from Lynden to Whatcom?

A. The distance from Lynden to Whatcom is 21 miles by steamer. They call it 14 to Lynden and 7 miles across the bay.

Q. Then there are seven miles of open salt water?

A. Yes, sir, that is the way we used to estimate.

Q. And by road it is how far?

A. Nine miles; we have said Lynden; we should have said Ferndale; you got mixed.

Q. Is the road good between Ferndale and Whatcom?

A. The plank road is good.

Q. Does the plank road stop at Ferndale?

A. Yes, sir, it comes right from there to here.

Q. That is a good road? A. Yes, sir.

Q. Is it all on the level?

A. Yes, sir; it is a 5 per cent grade.

Q. And that is nine miles? A. Yes, sir.

Q. How long has that road been built?

A. It was finished last year.

Q. Has the opening of that road supplied the wants of the people?

A. For those living on it, but those that live on the river it doesn't supply their wants, as they have no road to get to it.

Q. And some on the road might prefer to ship by river?

A. No, sir, they would have to haul back.

Q. Those on the river prefer to use the river?

A. Yes, sir.

Q. And those on the road prefer the road?

A. Yes, sir.

Q. The river does not run parallel with the road?

A. No, sir, perpendicular, almost.

Q. Have you any knowledge of the demands of commerce? A. Some.

Q. Do you think there is sufficient commerce to warrant constant connection by boat between Lynden and Whatcom?

Mr. Newman. We object, as incompetent, as calling for

an opinion of the witness and no foundation has been laid for any such testimony from this witness.

Q. Answer the question.

A. I should think so.

Q. State what you base that opinion on.

A. On the amount of produce that would be shipped if they had the opportunity. There is a great deal of stuff on the river that is not sold that lies in the barn for want of getting it out. They cannot ship it out. There are no roads up or down the river and there is no cross the river excepting at Ferndale and the ferry.

Q. If the river was open there would be no necessity of roads?

Mr. Newman. We object, as leading and assuming a condition of facts not true, and incompetent, and calling for an opinion of the witness, no foundation having been laid.

A. No, sir; you cannot have a road up and down the river on either side.

Q. Why?

A. The ground is too low. Mr. Matz lives on the river. He has a road to his house and he has five miles to haul his stuff to town before he gets to Ferndale, and the river is right at his barn.

Q. Do you know to what cause the people along the river who are familiar with its commerce and the demands for navigation attribute the fact that there are no boats running there regularly?

Mr. Newman. We object, as incompetent, as not proper rebuttal, as having been gone over thoroughly by the

plaintiff in this action in its examination in chief, as calling for an opinion of the witness, no foundation having been laid, and is entirely hearsay.

Q. Answer the question.

A. A part of it would be hearsay. The people lay it to jams below, and I know steamboatmen lay it to jams below, as I have conversed with them about it.

Q. What caused those jams?

Mr. Newman. Same objection.

Q. Go on.

A. They all claim on account of the boom there is something the matter. I have lived on the river 15 years and the past few years we have had no navigation, and we used to have.

Mr. Newman. We move to strike out as not responsive.

Q. Outside of the jam at the mouth is the navigation as good as it used to be? A. Better.

Q. Better? A. Yes, sir.

Q. Do you know when the Government removed these snags? A. Yes, sir.

Q. State what years that work was done.

Mr. Newman. We object as incompetent, irrelevant and immaterial; not rebuttal; calling for an opinion of the witness, no foundation having been laid.

A. It was done in three different years.

Q. What years?

A. I don't know as I can recollect. The last year, I think, was a year ago last summer or last fall. It has been there three different times. Twice she went clear through. The first time she only went as far as Lynch's place.

Q. Are there any sawmills or shinglemills on the river? A. Yes, sir.

Q. Do they make any considerable product?

A. Yes, sir.

Q. Right on the river front? A. Yes, sir.

Q. What is the size of these mills?

A. One cuts about 100,000 shingles a day and the other 40,000 or 50,000 a day.

Q. What is the principal market?

A. Here through this place; it passes out of here, of course.

Q. At New Whatcom deep water vessels load for foreign ports? A. I suppose.

Q. They take cargoes of lumber and shingles?

A. That is what they say; I saw a vessel here and they said they were going to Valparaiso with lumber.

Q. Are there cedars along that river for shingle mills; any cedar there?

A. Yes, sir, considerable cedar.

Q. And opportunities for sawing that lumber up and down the river?

A. Yes, sir, they can log along the river there are two sawmills and one shingle mill.

Q. Is that river of sufficient depth to remove scow-loads of shingles? A. Yes, sir.

Q. Have these mills been established long?

A. No, sir.

Q. How long?

A. About a year; that is, two of them.

Q. Have you a general idea of the inhabitation of the vicinity of the river up there?

A. I do not understand.

Q. I will change it; have you a general idea of the character of the settlement along the river banks?

A. Yes, sir; the same as any man doing business there.

Q. I will ask you whether or not the trade and general commerce is increasing along the river or decreasing?

A. Increasing very rapidly.

Q. Whether or not they are being settled?

A. Yes, sir, they are.

Q. Good or bad is the land?

A. Very good for heavy crops; some of them get water on them, but they get the crops.

Q. They get hay and grain and oats?

A. Yes, sir.

Q. Good for dairying purposes? A. Yes, sir.

Q. Have the people turned their attention much to dairying? A. No, sir.

Q. No product for dairy products?

A. They would have to send it off; there are one or two small dairies out west of us.

Q. Between Lynden and the mouth of the river is the river pretty well settled along the bank?

A. I think it is settled; not all improved, but it is taken up, and there is someone about every quarter section, unless some man has two or three quarters.

Cross-Examination by Mr. Newman.

Q. Mr. Rogers, were you not mistaken in stating that there were no wagon roads parallel with the river?

A. I said close to the river.

Q. Don't you know that extending from Ferndale on the right bank of the Nooksack River, as you go towards its mouth, there is one of the best dirt roads in the country from Ferndale to the Indian Reservation?

A. That is part true and part not.

Q. Explain.

A. For one mile it goes parallel with the river and the rest it doesn't.

Q. It goes parallel as far as Tause's place?

A. No, sir, as far as Byers' place; it runs to the left and between Tause's and the river is 160 acres.

Q. You understand how crooked the Nooksack River is? A. Yes, sir.

Q. You know, then, that practically it would be impossible for any wagon road to parallel that stream?

A. I know it doesn't.

Q. Does the road extending from Ferndale south to the Indian Reservation parallel the river?

A. No, sir, it does not; it lacks a mile of it.

Redirect Examination by Mr. Robertson.

Q. The reservation is on the side opposite Whatcom?

A. Yes, sir.

Q. Is there any bridge there?

A. No, sir, and when they want to go to Whatcom they have to drive to Ferndale and go over the bridge.

Witness excused.

T. O'KEIFF, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. Where do you reside?

A. About five miles above Ferndale; between Ferndale and Lynden.

Q. On what side of the river; the west side?

A. The Lummi side.

Q. State how long you have lived there?

A. Six years.

Q. Have you a place there? A. Yes, sir.

Q. You are a farmer? A. Yes, sir.

Q. How much have you cleared?

A. 20 acres under cultivation.

Q. How much was cleared when you went there?

A. None.

Q. Cleared that yourself? A. Yes, sir.

Q. What do you raise?

A. Potatoes and hay and vegetables.

Q. You are clearing the farm every day?

A. Yes, sir.

Q. Are you familiar with your neighbors in their clearing? A. Yes, sir.

Q. Are they clearing up the land in the vicinity?

A. Most everybody is.

Q. State whether or not you have any reason to ship any products to Whatcom or to communicate with there frequently.

A. When the boats ran I always shipped considerable.

Q. I will ask you which is the most convenient and practical for you to use; the roads between Whatcom and your place or water transportation?

A. I have no road out, practically out, except about a month in the year.

Q. Explain the character of the land; the river overflows? A. Yes, sir.

Q. And these farms are in the river bottom?

A. Yes, sir.

Q. And the roads are generally wet? A. Yes, sir.

Q. Now, is there much logging done along the river?

A. At present there is very little.

Q. There are not many logs passing down the river?

A. No, sir.

Q. What is the condition of the river with reference to navigation, if you know?

Mr. Newman. We object, no foundation having been laid and calling for an opinion of the witness.

A. They cannot navigate the river a great deal for a great part of the year.

Q. What caused these boats to stop navigating, if you know?

Mr. Newman. We object as incompetent.

Q. I will waive the question; have you any idea of the value of the products along that river and that is tributary to it?

Mr. Newman. We object, as incompetent and calling for an opinion of the witness, no foundation having been laid.

A. I have not any sure value; I have an idea about what it is.

Q. Just state generally.

Mr. Newman. Same objection.

A. I should think about $10,000 a year.

Q. You think that is a moderate estimate?

A. Yes, sir, but I didn't consider that for the whole river; that is my neighborhood.

Q. Mr. Matz says he will have $5,000 worth and his brother will have $5,000, that will be $10,000, and the gentlemen across the way will have half as much as he has, and another gentleman as much. That would be $20,000; in taking your estimate you took the value only in your neighborhood? A. Yes, sir.

Q. Did you include Jacob Matz in that?

A. Yes, sir, he lives next to me.

Q. Is the river occupied and settled other than when you arrived?

A. Yes, sir, pretty much up and down.

Q. And in giving this estimate you didn't take into consideration the other products?

A. No, sir; I have not been up the river on the other side.

Q. You have not figured on that? A. No, sir.

Q. You think that the products in your vicinity would be $10,000?

Mr. Newman. Same objection.

A. Yes, sir.

Q. Is it practical for the farmers to ship by any other means than the river satisfactorily? A. No, sir.

Q. Are you familiar with the boom at the mouth of the river?

A. I have been there four or five times.

Q. You log sometimes? A Yes, sir.

Q. What is the prevailing price of logs per thousand?

A. We got $3.00 this spring.

Q. What is the current market rate at this time?

A. About $3.00; you can get lots of them at that.

Q. Not to exceed that?

A. It should be an extra quality that would exceed $3.00.

Q. Are you sufficiently familiar with the amount of traffic over that river to state whether or not if the navigation would be opened a little boat would be profitably employed there generally?

Mr. Newman. Answer by yes or no.

A. Yes, sir.

Q. Do so.

Mr. Newman. We object as incompetent and not proper rebuttal testimony, and calling for an opinion of the witness, no foundation having been laid, and implying the existence of a state of facts that do not exist.

Q. State what you know about the subject asked you.

A. We have had lots of lumber this spring waiting for a boat. It is not mine, but I am interested, as I got part of the logs and am not paid yet.

Q. That is the lumbermill?

A. Yes, sir.

Q. On what market do they depend?

A. He sold this lumber in Seattle and the water transportation was poor and he could not get it all down.

Q. Do you think you could market the output of that mill if that river was open?

Mr. Newman. Same objection.

A. Yes, sir.

Q. Is it practical to deliver that output in Whatcom other than by the river to compete with the other mills?

A. It must go through the river to compete with the others.

Q. If you had ready means of connection by the river do you think that this mill could place all its products and use the river as a means of carrying it to market?

Mr. Newman. Same objection.

A. Yes, sir, I think it could.

Q. What do you know about the timber; the cedar timber along the vicinity of where you live?

A. The cedar timber is a good deal of the rough order; cedar bolt timber.

Q. Is there considerable of that shingle bolt timber for mill purposes? A. A good deal.

Q. Is there any shinglemills along that river?

A. Yes, sir, at Ferndale.

Q. What is the daily value of that lumbermill?

Mr. Newman. We object as not proper rebuttal, no foundation having been laid and calling for an opinion of the witness.

Q. What is the amount of lumber daily put out?

Mr. Newman. Same objection.

A. They are supposed to cut 20,000 a day.

Q. What is that worth when cut per thousand?

A. I am not certain, but I should say from $6.00 to $7.00.

Q. How many do they employ at the mill and in looking after the mill?

Mr. Newman. Same objection.

A. Four or five men.

Q. What is the output of the shinglemill?

Mr. Newman. Same objection.

A. 100,000 a day.

Q. And what is the value of 100,000 shingles?

Mr. Newman. Same objection.

A. $125.00.

Q. That is $125.00 a day? A. Yes, sir.

Q. What is the most ordinary and available method of marketing that product of the shinglemill?

Mr. Newman. We object for the same reason.

A. I think they send most of them east on cars; about all of it.

Q. That is also available to the river and for the sound?

A. Yes, sir.

Q. And that is also another market for shingles?

A. Yes, sir.

Q. Do you know what the people along the river generally attribute the fact that boats are not running in the river now?

Mr. Newman. We object, as incompetent, irrelevant and immaterial, as not proper rebuttal testimony, as calling for an opinion of the witness, no foundation having been laid; further, it is entirely hearsay.

Q. Just answer the question.

A. Getting in and out of the river.

Q. How long has this trouble existed, getting in and out of the river?

Mr. Newman. Same objection.

A. Ever since I came there, pretty much

Q. Do you know anything about this boom?

A. Yes, sir, I have seen it a good many times.

Q. State whether or not that has any effect on the navigation of the river, if you know.

Mr. Newman. Same objection, and further, that phase of the question has been thoroughly gone over by the plaintiff in his original examination.

A. Yes, sir, I have gone down the river with steamers, and once the captain asked one of the men attending to the boom if he could get through and he would not answer, and he asked him three times and he would not answer, and he went the other way and was stuck two or three days, and he could have told him right and he would have saved him $100.00

Q. When was that?

A. Three years ago. He was one of the men on the boom that was boss, for Mr. Clark asked him if he caught a boat and he said yes, and Mr. Maltby asked him if the river was clear and he would not answer; he asked him two or three times.

Q. This channel is not all occupied by the boom?

A. No, sir.

Cross-Examination by Mr. Newman.

Q. You have resided six years in this county?

A. Yes, sir.

Q. More or less?

A. A little over six years—a month, I think; no, two months over six years.

Q. You testified as to the market price of logs; saw logs at this time; your testimony was based on the market price at this time? A. Yes, sir.

Q. Are you in the business of handling and sell logs in the market?

A. I have sold a few this spring.

Q. How many? A. 100,000.

Q. Where did you sell them? A. At Ferndale.

Q. And the market price was $3.00?

A. Yes, sir.

Q. Your knowledge of the market and the market value at this time is based on that transaction?

A. Well, we would have got out more logs at $3.00 if we could have got it.

Q. Read the question to the witness. (Question read.)

A. Yes, sir.

Q. Do you know anything about the market value of saw logs at the mills in Seattle or Tacoma or Port Blakely or Port Gamwell or New Whatcom?

A. No, sir.

Q. You do not know anything about that?

A. No, sir.

Q. You are not prepared to testify that good, first-class, merchantable saw logs can be bought to-day in any of these markets at the price of $3.00 per thousand feet board measure?

A. We will furnish any amount of logs on the Nooksack River at that price.

Q. Answer the question. A. No, sir.

Q. Do you know of any good quality, good, first-class,

merchantable logs being sold in any of these places for $3.00 per thousand feet board measure?

A. I do not know anything about those markets at all.

Q. You testified about a certain kind of lumber that you wanted to ship to Seattle?

A. I didn't want to ship it; I sold the logs to the mill and they could not pay us because they could not ship to Seattle.

Q. That is what they told you, is it? A. Yes, sir.

Q. They told you that was the reason?

A. Yes, sir.

Q. And your testimony is based on that?

A. My testimony was based on the fact, for a boat came up and got a load and laid on the flats for a week or more.

Q. How do you know? A. I saw the captain.

Q. And he told you?

A. Yes, sir, and I heard it from others.

Q. You didn't see her? A. No, sir.

Q. You only heard so?

A. I saw her at Ferndale and I saw she didn't go through at Whatcom.

Q. You do not know anything about her being on the tide flats?

A. Yes, sir, I could look over and see a boat workin on the tide flats.

Q. You did see her there for a week?

A. I saw she was trying to get off.

Q. From where did you view her?

A. From New Whatcom.

Q. And saw the smoke of the boat over there?

A. Yes, sir.

Q. And that is all you know about it?

A. Yes, sir.

Q. Do you know anything about whether or not the party who didn't pay you had a contract to ship lumber to Seattle?

A. I think they had.

Q. I asked you if you know?

A. To my positive knowledge I do not know. I know that lumber is going there every day from them.

Q. Did you know that these parties in the sawmill were dealing with the sawmills in Seattle and shipping lumber by water to Seattle?

A. They were shipping there when they had enough to send a load.

Q. Shipped every little while?

A. Yes, sir, when they could.

Q. When they could? A. Yes, sir.

Q. Do you know to your personal knowledge of their being delayed in regard to any shipment to Seattle other than what you have testified to? A. I do not.

Q. You have told all you know about that lumber?

A. Yes, sir.

Q. Your testimony regarding the quality of timber along the Nooksack River is confined to the timber upon the lower waters of the Nooksack River in what is termed the valley? A. Yes, sir, a good deal.

Q. You have been questioned regarding the shingle-mill at Ferndale; do you know of that shinglemill shipping its product by water?

A. Not that I ever knew of; I do not think they ever did.

Q. Isn't it a fact that all that product of the shingle-mill is shipped to the east by rail exclusively?

A. All that I know to my knowledge.

Redirect Examination by Mr. Robertson.

Q. You do some logging yourself?

A. At times, yes, sir.

Q. And you talk with logging men about the price of logs from time to time? A. Yes, sir.

Q. And read the reports of the value of logs in the market? A. Yes, sir.

Q. And your information as to the prices of logs is gained from these sources of information?

A. Yes, sir.

Recross Examination by Mr. Newman.

Q. Let me understand you; you say you examined the market reports as to the current price of saw logs in the markets of Puget Sound, do you?

A. We have some timber that we have tried to sell—

Q. Just answer my question and counsel can further examine you; you testified just now that you examined the market quotations?

A. I consider my market where I can sell.

Q. I am speaking of the market of Puget Sound, which includes the market of New Whatcom. What market quotations have you examined during the last year that quoted the price of saw logs, good, merchantable, first-class timber, at $3.00 per thousand?

A. I base my answer that we would take that if we could get it.

Q. Where?

A. On the banks of the Nooksack River.

A. Yes, sir.

Q. Do you mean to say you would put in good, merchantable timber, first-class timber, at Ferndale for $3.00 a thousand?

A. We would put in good, merchantable timber for $3.00 a thousand.

Q. At Ferndale?

A. Just where we live, and above a little.

Q. Just a few miles above where you live?

A. Yes, sir.

Q. Where would you get it?

A. Back where we live.

Q. That is a part of the valley?

A. It has been burned over.

Q. Do you call that good, merchantable timber?

A. They would average over half good, merchantable timber.

Q. Don't you know if the fire has gone through the timber that you cannot sell that timber to a single mill on Puget Sound for good, first-class, merchantable timber?

A. The fire only went through last year.

Q. Don't you know you could not sell it in a single mill for first-class timber if the fire has gone through it?

A. No, sir, I do not believe that and I do not believe that the fire has injured it.

Q. That is the timber you refer to as being poor timber?

A. Cedar was spoken of.

Q. You characterized as poor timber in the Nooksack River valley, that is the character of timber you spoke of?

A. That was cedar.

Q. Can you tell of a single instance where first-class logs have been sold on Puget Sound for $3.00 per thousand?

A. Those logs on Puget Sound have an expense of hauling from the lakes that we would not have.

Q. Then the market price you fixed is for timber that the fire has passed through?

A. Yes, sir.

Q. That is where you got your idea of the market price? A. Yes, sir.

Redirect Examination by Mr. Robertson.

Q. Do you know the market value of lumber per thousand by car-loads? A. I do not

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Afternoon Session, May 31, 1895.

Mr. Robertson. We now offer for identification a map of Whatcom County, showing the Nooksack River and the general location of the public county roads, which are evidenced by small dotted lines.

Mr. Newman. We have no objections.

Mr. Robertson. We will mark the same Plaintiff's Exhibit "E," and we offer the same in evidence without objections from the defendant.

ARCHIBALD MORRISON, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. Your name? A. Archibald Morrison.

Q. Where do you reside? A. Ferndale.

Q. On the Nooksack River? A. Yes, sir.

Q. What is your business? A. Sawmill business.

Q. How long have you been connected with that sawmill?

A. It is something about three years since we started.

Q. How long have you lived at Ferndale or on the Nooksack River?

A. It will be four years the 8th of August.

Q. How long has the mill been running; three years?

A. I cannot remember the exact date we started the mill now; something about three years; I do not remember. I will not say particular about the date.

Q. Is your mill working every day?

A. Almost every day; sometimes we shut down for repairs like all mills.

Q. What is the output of your mill per day; how much lumber can you saw?

A. The capacity of the mill is 25,000, but we do not run it to its full capacity. We have a small crew on.

Q. Where is your best market for lumber?

A. Seattle has been the best market.

Q. What is the most available way and cheapest of getting your product from your mill to Seattle or Whatcom?

A. Our cheapest way is by boat, but we have to ship by rail as we have no boat.

Q. What is the difference as to cost by boat instead of rail?

A. As near as I can give it is $1.40 a thousand.

Q. How do you mean?

A. For a thousand feet of lumber it costs $1.40 more by rail than it does by boat.

Q. Have you a sale for any amount of timber?

A. We supply three of the largest box factories in Seattle and we had a contract for 300,000 feet, but we could not get a boat after getting it and had to send it by rail.

Q. What kind of timber? A. Spruce.

Q. If you had good navigation on the river would you be able to increase the capacity of your plant?

Mr. Newman. We object, as calling for a conclusion of the witness.

A. I think so, for this reason; we would be able to deliver lumber in Seattle cheaper and could get out more of it.

Q. Is the necessity for navigation along the river now greater or less than when you first came there?

Mr. Newman. We object as incompetent, not proper rebuttal, calling for an opinion of the witness, no foundation having been laid.

Mr. Robertson. I offer this evidence, together with other evidence, as evidence in defense of the affirmative allegations contained in answer of the defendant, which are not a part of the case of the government in the first instance, as well as for the purpose of rebutting other evidence in the case that logging is of the most value on this river.

A. What is the question?

Q. (Question read.)

A. I should think it would be greater, for before we came there was no mill there to cut lumber and there are many more settlers.

Q. How many more; how many men have started in to improve farms within the last three years to your knowledge?

A. I do not know as I can answer that; I am not familiar enough with the subject; I know of three not far up the river that have started in to improve their ranches.

Q. Do you know if there are others above there?

A. I am not much acquainted with the river further up.

Q. And from your general observation of the improvements along the river to your knowledge and the number of settlers, do you think there is more business for boats plying on the river than three years ago?

Mr. Newman. Same objection.

A. I do not know if there is more trade; I could not say as to that; times are so dull; if times were as good as three years ago, there would be more.

Q. How many boats ran up this river three years ago, before the boom was placed in there; how many days?

Mr. Newman. We object, as incompetent, not proper rebuttal, the matter having been gone fully into before by the plaintiff, and calling for an opinion of the witness without any foundation having been laid.

A. Three years ago I have seen three boats at Ferndale in one day.

Q. Is it practical to compete with the market, other than the home market, for the sale and placing of your products, to avail yourself of any means other than the river?

A. What?

Q. I will withdraw that question. What is the most available means at your hands of placing your products on the market?

Mr. Newman. Same objection.

A. By steamboat, if we had it.

Q. Is it practical for you to haul your lumber by wagon to tide water and there dispose of it?

A. No, sir, it is not.

Q. Are you familiar with the market price of logs in your neighborhood?

A. Not fully, I can state the prices we are paying.

Q. Can you state the market price along there where your market is?

Mr. Newman. We object as incompetent, no foundation having been laid for the witness to testify.

Q. Answer the question.

A. $2.50, and $3.00 and $3.50, according to quality.

Q. For first-class, merchantable logs?

A. For merchantable logs.

Q. Do you know the value of the commerce along that river?

A. I know there is a lot of timber to come out.

Q. Other than timber?

A. There is a great deal of hay raised along the river and grain that wants a market.

Q. Does the Great Northern Railroad strike the Nooksack River above your mill?

A. It crosses the river below our mill.

Q. Below your mill? A. Yes, sir.

Q. How far?

A. Something like half a mile; not quite half a mile.

Q. What are freight rates over the Great Northern to Seattle a thousand on lumber?

A. 7½ cents a hundred.

Q. Do you know the feelings of the people along the Nooksack River with reference to whether or not they desire this boom at the mouth of the Nooksack River for the purposes of marketing their logs or the removal of the boom for the purposes of availing themselves of the river for conveying the products to market?

Mr. Newman. We object as incompetent, irrelevant and immaterial, not the best evidence, calling for an opinion of the witness, no foundation having been laid, and as hearsay.

Q. Answer the question, please. (Question read.)

A. As far as I have any knowledge they are all very anxious to have a boat.

Q. Anxious to have the river opened?

A. Yes, sir.

Q. Do you consider this river of sufficient depth and width to be available for the general purposes of navigation?

Mr. Newman. Same objection.

Q. Answer the question.

A. I think the river is perfectly navigable. I brought down a barge load with 70,000 feet on it without any boat from our place to the mouth of it.

Q. Did you get through the mouth without any trouble?

A. No, sir; it went into the jam and the boat came there and got us out.

Q. What is this jam caused by, if you know?

Mr. Newman. Same objection.

Q. What is the reason?

A. As far as I understand and from my knowledge and I have seen it, it is caused by the piling catching the drift wood.

Q. What piling is that?

Mr. Newman. Same objection.

A. I do not think I can answer that; I am not posted as to who owns it.

Q. It is the piling that goes to make a part of this boom?

Mr. Newman. Same objection.

A. That is the piling I mean; that makes the boom.

Q. If not for this piling could this barge have continued out to deep water? A. Yes, sir.

Q. Do you know how many people live along the banks of that river between Ferndale and Lynden?

A. No, I could not tell you.

Q. Approximately, can you tell; it is 12 miles, isn't it? How many miles from Lynden to Ferndale?

A. I came down several times, but I could not tell how many persons live there.

Q. Quite a number? A. It is all settled.

Q. How many people live in Lynden?

A. I am not posted.

Q. How many approximately?

A. I never was there but once.

Q. How many people live at Ferndale?

A. I did know; I cannot give you true figures on that now.

Q. Can you approximately?

A. Between 300 and 400 I should say.

Q. And you have some merchants there?

A. Yes, sir, we have two or three stores.

Q. What is the principal market that supplies the merchants with their supplies, if you know?

A. Seattle and Tacoma, I think, are their principal point for supplies.

Q. Do they ever ship these supplies by water?

A. They used to when they had the boat running.

Q. When the boats were running? A. Yes, sir.

Q. Did they carry the mail by boat at any time since you have lived there? A. Not to my knowledge.

Cross-Examination by Mr. Newman.

Q. The merchants, when they did receive by water, did so prior to the construction of the railroad; since the construction of the Great Northern connecting Ferndale with Seattle have there been any supplies sent by water? A. I think there have been some.

Q. You think there have been some?

A. Yes, sir.

Q. Don't you know as a fact that it did largely away with the transportation by boats?

A. I came here after the railroad was built.

Q. It was built a year or so before you came?

A. Yes, sir.

Q. The only business that your mill is doing at this time, outside of supplying the local trade, is with a contract with Seattle people?

A. We have a contract with one party and are supplying other parties without a contract; supplying three with all they want.

Q. Most of your output is for local demand?

A. We shipped some as far as Buffalo.

Q. You are referring to shingles?

A. No, sir; we do not manufacture shingles.

Q. You do not manufacture shingles?

A. No, sir.

Q. That lumber is laid direct on the cars there at Ferndale? A. Yes, sir.

Q. And shipped in that car to its destination?

A. I presume so.

Q. Would much be gained by you in rate by shipping by water and loading again in a car at New Whatcom?

A. No, sir; that was the first car we shipped.

Q. In any of your eastern shipments it would cost you more?

A. I could not say, this is the first car we have shipped.

Q. You never shipped but one car?

A. Yes, sir, we shipped down here to Cooper's mill here at New Whatcom; it was on this barge I spoke of. It would have cost twice as much by train and there were no roads then.

Q. Since that time the plank road has been built between Ferndale and New Whatcom.

A. Yes, sir.

Q. Can you haul lumber as cheap by way of the plank road as you can send it by water?

A. No, sir, not by one-half. We got some down this morning by team that cost us twice as much as it would by water and loaded it in a car at Whatcom.

Witness excused.

GEORGE J. CRANE, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. What is your full name?

A. George Jiles Crane.

Q. Where do you reside?

A. Six miles above Ferndale on the Nooksack River.

Q. On the Nooksack River? A. Yes, sir.

Q. What is your business? A. Farming.

Q. How much land do you cultivate?

A. I have a new ranch with 25 acres under cultivation.

Q. How long have you lived there?

A. Seven years in July.

Q. Is the river thickly settled between Ferndale and Lynden?

A. No, sir, not thickly settled; I think there is a settler to every quarter section.

Q. On both sides of the river? A. Yes, sir.

Q. Is the land good for farming on both sides of the river? A. Yes, sir.

Q. Is it of the same general character on both sides?

A. Yes, sir.

Q. And the farms are generally of the same character?

A. Yes, sir.

Q. State whether or not you are familiar with the amount of produce raised along the river generally.

A. No, sir, I could not say that I am familiar with it; all I could judge of is myself and neighbors.

Q. Just detail about what surplus products you can raise in a season.

A. I think the most I have ever had for any one season would be six or eight tons of vegetables, but now as I am going into hay I will have from 30 to 50 tons, and as I open up my place it will be more.

Q. Has there been any increase of improvements along the river recently?

A. Yes, sir, I think every year there are more improvements being made.

Q. State the general character of the land along the river and what it costs per acre to clear.

A. In my locality the general character is a sandy loam and back there is mucky ground and the cost to clear per acre does not exceed $15.00; that is my own place I am speaking of.

Q. And all of the land there is similar?

A. Yes, sir; there are streaks that are heavier and some less so.

Q. Any very heavy timber?

A. No, sir, not on place.

Q. Any alder?

A. Yes, sir, some and a good deal is open marsh or beaver land.

Q. Who else lives along there where you are and raises surplus products?

A. Goods and Sears and Keith and Larsen.

Q. What does Goods raise?

A. He raises garden stuff and hay and the last two years they have hauled their hay through the marsh—through the mud to the hubs.

Q. How much land do they cultivate?

A. About 20 acres on the home ranch and then they rent 15 acres, and there is Hause that has 20 or 30 acres and depends on the river for shipping, and Forbes raises 200 or 300 tons of hay and depends on the river.

Mr. Newman. Confine yourself to the question.

Q. Name the other parties.

A. Mr. Forbes?

Q. Yes, sir.

A. Mr. Forbes has always depended on the river for—

Mr. Newman. We object as not responsive.

Q. Go on and state what means these parties use to get their products to market.

Mr. Newman. We object, as calling for an opinion of the witness, not the best evidence, and no foundation having been laid.

Q. Give it now.

A. As long as the boats ran they depended on the boats and since, any way they could to get it to market.

Q. Have they experienced any difficulty in getting to the market since the boats stopped on the river?

Mr. Newman. Same objection, and further, the question is misleading as implying a condition of facts that has not been established.

Q. Then I will ask you this; state whether or not the navigation on that river has changed any for the better or worse in the last three years.

Mr. Newman. We object as incompetent, calling for an opinion of the witness, no foundation having been laid; further, it is not proper rebuttal.

A. Four years ago there were steamers plying there regularly and had good loads every trip up and down. To-day there is not a boat on the river and plenty of stuff in barns that cannot be hauled away. The Nooksack River is a navigable stream and they should keep it open; that is my opinion.

Q. Have you any feeling or animosity or feeling toward this boom company?

A. No, sir, but I should have, as I was down there all night trying to get through.

Q. When was that? A. Three years ago.

Q. Do you know what the people attribute the falling off of the river commerce to there?

Mr. Newman. We object as incompetent, irrelevant and immaterial, calling for an opinion of the witness, no foundation having been laid, and not proper rebuttal and hearsay.

A. The mouth of the river is in such shape that it is impossible to get out or in and if a man gets his boat up he may not get it down, or rather out, and they do not want to try and get up and get stuck; that is the reason they have stopped.

Q. There is freight there for the boat?

A. Yes, sir, plenty.

Mr. Newman. For the reason above given, and that the answer is not responsive, we move that it be stricken from the record.

Q. State, if you know, what makes this navigation at the mouth of the Nooksack River so difficult.

Mr. Newman. Same objection, and further, that this phase of the case was gone over thoroughly by the plaintiff before.

A. To the best of my knowledge, it is the piles driven there, and they catch this drift coming down the river, and it forms jams and that makes it bad, and that makes it overflow and destroys our crops, and snag boats have been there and pulled out snags.

Mr. Newman. We move that all that part in regard to jams and the snag boats be stricken out as incompetent, irrelevant and immaterial.

Q. Has the commerce or the products for sale along the river increased or decreased?

Mr. Newman. We object as incompetent, irrelevant and immaterial, not proper rebuttal testimony, calling for an opinion of the witness, and no foundation has been laid.

A. Increased every year.

Q. More raised there?

A. Yes, sir; you might say it is doubled.

Q. Are the people along this river desirous of having unobstructed connection by water with the outside world?

Mr. Newman. We object, as incompetent, not rebuttal testimony, calling for an opinion, no foundation having been laid, and is hearsay.

A. What was the question?

Q. (Question read.)

A. I know they are out for a distance of four or five miles on each side of the river.

Q. What is the general opinion of the inhabitants along this river with reference to the causes that has brought about this decrease of boat service?

Mr. Newman. We object for the same reason.

A. The general opinion is that this one-horse boom company is causing the stoppage of navigation, and that it should be cleared up.

Q. Do you know how many people live in Lynden?

A. I think about 500, but I do not know the exact number, but there are not as many as thre or four years ago.

Q. How many live in Ferndale?

A. I think about 400.

Q. And between these two places back about how is the land occupied?

A. I do not know of any land where I am acquainted that is not occupied.

Q. How far back?

A. North to the British Columbia line.

Q. About how far is that? A. Five miles.

Q. And on the opposite side?

A. As far as I know anything about.

Q. On each of these quarter sections?

A. All quarter sections will not be occupied, but all are taken up.

Q. And these people on each side of the river can they approach the river by roads that come to the river bank?

A. Yes, sir, at certain places, four or five miles apart.

Q. And all these residents on each side of the river must either go to the river to ship their produce or by rail by the Great Northern or over these roads to New Whatcom?

A. Yes, sir, and it would be better to haul it to New Whatcom than to the railroad.

Q. They are not accessible to the railroad?

A. Not for any one at Lynden.

Q. What is as near Lynden as the railroad?

A. Considering the roads?

Q. What is the condition of the roads before you strike the plank roads?

A. The general character of the roads is so bad that one does well to get along with a saddle-horse.

Q. It is a beaver marsh?

A. Yes, sir; along the river it is sandy, but on the highland it is mucky.

Q. Is there a road close to the river bank?

A. No, sir, not that I know of. Years ago there was a road surveyed, but it is not practical to keep it open for travel; it is very muddy there.

Q. Do you live right on the river?

A. Yes, sir.

Q. Do you see the amount of logs coming down?

A. I have not seen a great amount for the last six months, but those that come to Mr. Morrison's mill.

Q. Is there any great amount of logs coming down the Nooksack River in the last six or eight months to this boom company's boom down there?

A. I do not understand the question.

Q. (Question read.)

A. Not that I have noticed.

Q. Have you been down the river lately?

A. Only to Ferndale in a boat in the last year.

Cross-Examination by Mr. Newman.

Q. When did the decline in the steamboat traffic begin?

A. I think three years ago this fall. That is the first trouble I remember of.

Q. Prior to that time there was no trouble of any considerable amount?

A. Not that I remember; I came up many times and had no trouble on the boats.

Q. Three years ago there was no trouble?

A. I do not remember of any trouble. I do not know how long the boom was in. Three years ago was the first trouble we had. I had never been there before.

Q. You never noticed any decline in the river traffic until three years ago?

A. No, sir, and never heard any one complain about the boat not coming up until then.

Witness excused.

JAMES LYNCH, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. Where do you reside? A. Near Ferndale.

Q. What is your business? A. Farmer.

Q. Are you familiar with the Nooksack River and its navigation?

A. Yes, sir, I used to be some years ago, but of late years I have not been knocking around much. I have been confined to Ferndale for four or five years.

Q. What is your business there?

A. Farming.

Q. State whether or not the river is settled up along there.

A. Yes, sir, all settled up. Perhaps there might be quarter sections that a part might be settled and another part not.

Q. Have you any idea of the value of the products along there?

A. I have an idea, but only an idea.

Q. State what you know of the character of the products.

A. That would depend on the market price of the stuff. Hay is the most that is produced, and oats, and they raise all the way from 200 tons down to a little more than what they use themselves; that is, the farmers.

Q. How many farmers raise hay that they cannot dispose of?

A. About six or seven that would have quite a lot to transport if they had a boat; some of them might have from 50 to 200 tons.

Q. Do you know the names of the precincts on the river there where the people live that vote?

A. Yes, sir, two precincts in Ferndale and one at Lynden.

Q. Any voting place along or rather between Ferndale and Lynden?

A. Yes, sir, one at Woodlawn.

Q. What is the character of this river with reference to its navigability now?

A. It is counted pretty good; I have been talking to some of the United States officers when they called up there. It is a small river; it is a nice river.

Q. No rapids? A. No, sir.

Q. It runs through a low country?

A. Yes, sir.

Q. It is not very rapid?

A. No, sir, unless there is a big flood.

Q. In ordinary times what is it?

A. 3½ or 4 miles.

Q. Does the tide back up to Lynden?

A. No, sir; I have seen it up two miles; that is back water.

Q. Are the roads there generally used by the people, the country roads, to get out their products, or what means do they use?

A. They have to use the roads; they have no other means there are no boats that come up and they have got to; it is compulsion.

Q. Before that?

A. Those that had stuff to amount to anything, such as hay or oats, would send it on the steamer by preference, if there was one. That is the way I always found the cheapest and best.

Mr. Newman. We move to strike out as not responsive, a mere opinion of the witness, and no foundation has been laid.

Q. Is Lynden an incorporated town?

A. I have heard it was.

Q. Is Ferndale? A. No, sir.

Q. How many people live in Ferndale?

A. I could not say; as near as I could get it, there was over 300 votes cast at Ferndale.

Q. At Ferndale?

A. Yes, sir, in the two precincts.

Q. Those people live there in the vicinity?

A. Yes, sir, in the precincts.

Q. How large is that precinct, do you know?

A. No, sir, I do not know what the boundaries are.

Witness excused.

A. DILLON, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. What is your official position?

A. Auditor of Whatcom County.

Q. How long have you been county auditor?

A. Since the 14th of January, 1895.

Q. Do you keep, as such officer, a correct list of the votes cast at the last election? A. Yes, sir.

Q. Have you such a list with you?

A. Yes, sir.

Q. Can you turn to this list and tell me the votes cast in the precinct bordering the Nooksack River on each side?

A. I cannot; the only thing that will interfere with that is that we only keep the highest total number of votes cast for any one candidate, and we have to figure the highest number for any particular officer. Take it in West Ferndale precinct, the vote for county attorney was 223,

and on commissioner it was 227; on some of the officers it was not as high.

Q. Is that the added vote, 227? A. Yes, sir.

Q. Where was that?

A. West Ferndale precinct.

Q. What was it at east Ferndale? A. 74.

Q. At Lynden?

Mr. Newman. What is the purpose of this testimony?

Mr. Robertson. The purpose is to show the votes cast at the different precincts along the Nooksack River, and to show the character of the inhabitants along there, and to inform the Court of the character of the settlement along the river.

Mr. Newman. We shall object to any testimony of this character being offered for any such purpose; first, as not tending to show any of the matters which counsel states he desires to prove, and it is incompetent, irrelevant and immaterial, not proper rebuttal testimony, and not the best evidence.

Q. Go ahead.

Mr. Newman. We object to the question as incompetent, irrelevant and immaterial, not the best evidence, the best evidence being the proper records.

Q. Answer the question.

A. 159 is the highest for any officer cast.

Q. 159 votes? A. Yes, sir.

Q. Is that in all Lynden? A. Yes, sir.

Q. What is the vote at Woodlawn?

Mr. Newman. We object as incompetent, irrelevant and immaterial and not the best evidence.

A. The highest I see is 23.

Q. 23 votes at Woodlawn? A. Yes, sir.

Q. What is the number of votes at Lummi?

Mr. Newman. Same objection.

Q. First, is the Lummi Reservation at the mouth of the Nooksack River included in the Lummi precinct?

A. No, sir, it does not comprise the reservation.

Q. What does it comprise?

A. Give me the map; the vote at Lummi precinct?

Q. Yes, sir, give me the vote at Lummi precinct.

Mr. Newman. Same objection.

A. The highest vote I see here is 61; 61 is the highest vote cast.

Q. Are there any other precincts along the Nooksack river or either of its forks?

A. Up further there are; I can state better from the map.

Witness excused.

CHIEF HENRY, of the Lummi Reservation Indians, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. What is your name? A. Chief Henry.

Q. Are you the chief of the Lummi Indians?

A. Yes, sir.

Q. You understand English pretty well?

A. Yes, sir.

Q. How many Indians live on the reservation?

A. 100 houses; 400 altogether.

Q. 100 what?

A. 100 farmers and 400 boys and girls altogether.

Q. Do you know the Nooksack River?

A. Yes, sir, I know.

Q. How long have you lived there; all your life?

A. All my life and my father and mother and all the Lummi Indians.

Q. Do you know anything about the drift wood coming down the river in high water? A. Yes, I know.

Q. Do you know whether or not any of the drift wood stops along the river anywhere?

Mr. Newman. We object as incompetent, as not rebuttal, as having been gone over thoroughly in plaintiff's original examination or original case, as calling for an opinion of the witness without showing any foundation.

Q. Do you know the question? A. No, sir.

Q. (Question read.)

A. Yes, sir, these piles stopped the logs and jams; the piles stopped it.

Q. What piles? A. This company's.

Q. Bellingham Bay Boom Company's piles?

A. Yes, sir.

Q. At the mouth of the Nooksack River?

A. Yes, sir.

Q. How do you know the piles stopped the drift?

A. These logs come down the Nooksack River, big logs, they come to the piles and stop this way (Strikes his hands together).

Q. When did you see them come there first?

A. Three years.

Q. Three years ago? A. Yes, sir, I think.

Q. Are there any logs against the piles now?

A. Yes, sir.

Q. What kind of logs?

A. Big stumps; big stumps.

Q. Stumps? A. Big stumps.

Q. Any saw logs?

A. No, sir, big stumps, sometimes.

Q. When did you see these stumps against the piles?

Mr. Newman. The defendant makes this one objection to cover all such questions; namely, that any testimony at this time relative to any alleged obstruction of the boom at the mouth of the Nooksack River is incompetent, as not proper rebuttal testimony, the same having been already gone over fully by the plaintiff in making out the original case.

Q. When did you see these stumps against the piles; when did you last see the stumps against the piles; how many days ago?

A. Three years I see them; lots of logs and lots of stumps there now.

Q. When there were no piles, before any piles were there, were there any logs or stumps stopped there?

A. No piles, no stumps; no piles, no stumps; no logs no piles.

Q. Before the piles were in there were no jams?

A. No piles, no jams; all logs go out on salt water.

Q. Before the boom was there the logs all went out in the deep water?

A. Yes, sir; piles stopped logs and big logs stopped, and you cannot open. They cannot go out.

Q. And steamers cannot pass through?

A. No, sir.

Q. Before these piles were there could steamers go in and out?

A. Yes, sir, yes, sir; no piles, no logs, and steamers go up.

Q. When the piles are there can the steamer go in and out?

A. You cannot go on steamer because piles here and logs here.

Cross-Examination by Mr. Newman.

Q. You are an Indian, are you?

A. Yes, sir, I am chief at Lummi.

Witness excused.

JOHN G. HYATT, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. What is your name? A. J. G. Hyatt.

Q. Where do you reside?

A. I live in Marietta precinct.

Q. How far from the mouth of the Nooksack River?

A. About two miles.

Q. Are you familiar with the mouth of the Nooksack River? A. Yes, sir.

Q. How long have you been familiar with it?

A. Twenty years.

Q. How long have you lived in that precinct?

A. About that length of time.

Q. How long have you settled there?

A. About 20 years.

Q. Have you a place there?

A. I lived there with my folks.

Q. How much land have you there?

A. 200 acres.

Q. How much under cultivation?

A. About 25 acres.

Q. Do you raise any surplus products?

A. Some.

Q. What do you do with it?

A. We dispose of them and sell them.

Q. Do you raise hay? A. Yes, sir.

Q. Where do you sell your hay?

A. To various parties; we generally sell it at home to people who come for it.

Q. Do you ever use the river for shipping?

A. Some; we have not of late.

Q. Why not?

A. On account of being a little better roads. It was once the only means of transportation.

Q. How do you get to Whatcom now?

A. We come down the wagon road.

Q. How many miles is it?

A. It is between seven and eight miles.

Q. From your place to Whatcom? A. Yes, sir.

Q. Are you familiar with the piling of the Bellingham Bay Boom Company at the mouth of the Nooksack River?

A. I am.

Q. Are you familiar or do you know whether any drifts have formed along the mouth of the Nooksack River?

A. I do.

Q. Just explain to the Judge what you have observed with reference to these drifts.

Mr. Newman. We object to any and all testimony from this witness as to any obstruction or alleged obstruction created by any piling alleged to have been placed in the mouth of the Nooksack River by the defendant company, upon the ground that the same is incompetent and irrelevant, the matter having been gone into fully by the plaintiff in making out its original case.

A. I consider that drift down in the mouth of the river causes sand bars, and I have seen it at various times; it is worse when it is high and clogs up there.

Q. What does it clog up there against?

Mr. Newman. The same objection to all matters on this point as heretofore given.

A. As near as I could see it was the piling.

Q. What piling do you allude to?

A. The piling driven along the channel that holds the boom there.

Q. Have you seen any of this drift against this piling itself? A. I have at times, yes, sir.

Q. When was the drift that you remember at the mouth of the Nooksack River against the piling?

A. I do not remember the date, but last winter there was a big drift there.

Q. Was this drift against these piles?

A. Yes, sir.

Q. How large a drift was it; how far did it go up the river?

A. I judge it extended three or four hundred yards, so it backed water to Clark's place.

Q. Did you go up and down this river for the last 20 years?

A. Not of late years, but I have went up in a boat now and then.

Q. Lately? A. Yes, sir.

Q. But I mean for the last 20 years have you been familiar with the river? A. Yes, sir.

Q. Before the piles were put in was there an open channel to deep water?

A. Yes, sir; better than now. It used to go in front of Marietta; there was no channel where it is now.

Q. Was this new channel cut before they put in the boom? A. I think about that time.

Q. That is the only channel used for navigation?

A. That is all; the old channel is blocked.

Q. Before this boom was there were there any drifts that prevented navigation at that point?

A. No, sir, not to speak of.

Q. What effect has the drifts at the mouth of this river had on the river commerce?

Mr. Newman. We object for the reasons above urged. and for the further reason that it calls for an opinion of the witness, no foundation having been laid.

A. I consider that it endangers the channel, as it

creates sand bars. When it swept down there before it had more room, but as it is now, it is blocked.

Q. But otherwise it is a straight shoot to deep water?

A. Yes, sir.

Cross-Examination by Mr. Newman.

Q. Don't you know that the old channel that used to run by the way of Marietta became blocked and a new channel formed before there was any boom there at all?

A. There would never have been any channel if it had not been helped.

Q. Don't you know the steamers went up on the Lummi shore prior to the construction of the boom?

A. It was very seldom and when the tide was very high.

Q. Don't you know before the construction of the boom no steamers, unless they were exceptionally light draught, went along the old channel by Marietta?

A. Yes, sir, the Monroe and Chehalis went up there clear through.

Q. That was before the construction of the boom?

A. Yes, sir.

Q. And prior to the construction of the boom that mouth at Marietta became clogged up?

A. Not to my knowledge.

Q. You claim to be pretty well acquainted with the mouth of that river? A. Yes, sir.

Q. And you do not know that the channel as it exists to-day along the Lummi Indian Reservation below the

mouth of the Nooksack River was the deepest channel; was it not the deepest channel at the time the boom was built?

A. Not when the tide was out. I have gone up and have had to get out and pull the boat through.

Q. Both before and after the boom was constructed on both sides? A. No, sir, not on the Marietta side.

Witness excused.

W. J. HENRY, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. Where do you reside? A. Near Marietta.

Q. How long have you lived there?

A. For the last three or four years.

Q. Your name? A. W. J. Henry.

Q. Are you familiar with the mouth of the Nooksack River and the Bellingham Bay Boom Company's structure? A. Yes, sir, quite familiar with it?

Q. State whether or not any drift wood or logs or drift of any kind has lodged along the piling of the boom.

Mr. Newman. We object as incompetent, the plaintiff having gone fully into the phase of this question in its original case and it is not proper rebuttal.

Q. Answer the question.

A. Yes, sir, I have seen logs and drift there; trees lodged against the piling and boom.

Q. For how great a distance?

A. I saw one jam that must have been 160 rods long.

Q. 160 rods?

A. Yes, sir, reaching nearly to Clark's place.

Q. Where was the lower end of this jam?

A. I didn't go down to the lower end, but there was a jam from the boom; it was stopped up at about Clark's place.

Q. Have you been down past the boom frequently?

A. Not lately.

Q. When were you there last?

A. I do not know as I have been there in a year or two. I used to have a mill there at the mouth.

Q. Were you familiar with it before the construction of the boom? A. Yes, sir.

Q. State whether they were subject to any log drifts that prevented free ingress and egress at the mouth of the river?

A. Not to really obstruct, and yet to a certain extent it was obstructed. There was one steamer that went through that had to push logs out of the way; it was not the channel that is open now.

Q. Are there any logs along the line of piling; any floaters along the piling parallel to the boom?

A. Boom sticks, you mean?

Q. Yes, sir. A. Yes, sir, lots of them.

Cross-Examination by Mr. Newman.

Q. The drift that comes down that river is composed of snags and brush and trees that are washed from the banks by high water and carried down?

A. Yes, sir.

Q. Before there was any boom there were not steamboats troubled with drift collecting on the shallow banks at the mouth of the river?

A. Yes, sir, they were troubled, but not to the extent of a jam.

Q. At all times, whether before or after the construction of the boom, the navigation at the mouth of the river has been difficult? A. Yes, sir, difficult.

Q. Because of the shallowness of the water where the waters of the river mingle with the waters of the bay it has caused trouble to navigation?

Mr. Newman. We object as calling for a conclusion of the witness, no foundation having been laid.

Q. Do you understand the question?

A. No, sir.

Q. Because of the shallowness of the water where the waters of the Nooksack River mingle with the waters of Bellingham Bay it has caused trouble to navigation?

A. If the tide is out they cannot get out at all.

Q. They have always had that trouble?

A. Yes, sir, after the tide was out.

Q. If the tide was out? A. Yes, sir.

Witness excused.

H. A. SMITH, being first duly called, sworn and examined, testified as follows:

Direct Examination by Mr. Robertson.

Q. Where do you reside?

A. I reside in Mountain View on the edge of the Indian Reservation.

Q. Are you familiar with the mouth of the Nooksack River? A. Yes, sir.

Q. Do you know of there being a jam in the mouth of the river about a year ago?

A. I do not know just the time, but about a year ago—

Q. Answer the question by yes or no.

A. Yes, sir, about a year ago.

Q. Fix the time as near as you can.

A. I think it was in April, the latter part of April, I was there, if my memory doesn't fail me. I know it was on some road business.

Q. Did you see this jam at the time yourself?

A. Yes, sir.

Q. Did you see what caused the jam?

A. Yes, sir.

Q. State what caused it.

Mr. Newman. We object to any testimony from this witness as to any alleged obstruction at the mouth of the river by the defendant's boom, for the reason that it is not proper rebuttal; that the plaintiff went fully into this question on its original case, and at this time it is incompetent, irrelevant and immaterial.

A. The logs were hung up on piles, I supposed. It seemed so to me; it was against piles and they backed up.

Q. What piles were they?

A. Some piles driven into the river below the town.

Q. Driven by the defendant company?

A. Yes, sir, I suppose so, in what we call the right channel.

Q. The new channel? A. Yes, sir.

Q. Not the Marietta channel? A. No, sir.

Q. At the time of this drift how extensive was it?

A. It was fully, I should think, a half mile; I didn't measure it, but it came beyond the town at that time and totally cut off the river.

Q. Down this river below the jam was there anything but the piles? A. No, sir.

Q. If the piles had been out could it have gone out?

A. Yes, sir.

Q. And the piles stopped it at that place and caused this jam? A. Yes, sir.

Cross-Examination by Mr. Newman.

Q. Did you go out on that jam?

A. No, sir, just along the bank.

Q. You viewed it from the shore? A. Yes, sir.

Q. There was brush there? A. No, sir.

Q. There was no brush in that jam?

A. Yes, sir, falling brush was there; I thought you meant on the beach.

Q. There were saw logs?

A. Yes, sir, and trees and everything you could think of.

Q. Whole trees with big roots? A. Yes, sir.

Q. You didn't go out on it at all? A. No, sir.

Q. Did you observe as to whether or not the lower end of the jam rested against any boom sticks or piles?

A. Well, no, I could not say that they did. Yes, sir, they were against the piles on the upper side.

Q. You observed that? A. Yes, sir.

Q. How without getting out on it?

A. I stood on the side and there were men putting in some blasts.

Q. Men working on the jam to get it out?

A. Yes, sir, and we had to go back to get away when they fired.

Q. Were they on the lower edge? A. Yes, sir.

Q. You said, in your opinion, that would all go out to sea if there were no piles there? A. Yes, sir.

Q. Don't you know the roots and branches extend out from 10 to 12 feet and they catch on the bars and would not go out?

A. Some of them would, but if in the channel they would go out.

Q. They would go out of the channel?

A. Yes, sir.

Q. You think it is deep enough to admit the passage of such drift? A. Yes, sir.

Q. How do you know the depth of that channel?

A. I was there before there was any boom there.

Q. Did you ever take any measurements so you could testify how large roots could go through?

A. I have poled up the river and judge from the depth of my pole.

Q. In your judgment, that whole jam would not have been there at all, but would have passed into deep water, if it had not been for the boom?

A. Not that I saw in there; I didn't see any very large ones.

Q. Did you make any particular examination of the jam to ascertain the size of the trees?

A. Only to look over it.

Q. And you looked over it from the shore?

A. Yes, sir.

Q. And the outside line of the boom sticks and piles are a long way from shore? A. Not so very far.

Q. 250 or 300 yards?

A. No, sir, not 250 yards.

Q. Not 250 yards from the shore? A. No, sir.

Q. You never made any examination of the jam except from the shore? A. No, sir.

Q. And never made any examination of the jam except from there? A. No, sir.

Q. How long have you resided in this county?

A. 21½ years.

Q. Don't you know it has been jammed at the mouth, full, prior to the construction of the boom, time and time again? A. No, sir, I do not.

Q. Don't you know that every freshet and every high water, both prior and subsequent to the construction of the boom, carries down an immense quantity of brush and trees which lodge in the mouth of the Nooksack River?

A. It lodged on the sand bars.

Q. At the mouth of the river?

A. Yes, sir, but it didn't obstruct the channel.

Redirect Examination by Mr. Robertson.

Q. These logs lodged on the tide flats?

A. Yes, sir. And it cuts a better channel where it lodges.

Recross-Examination by Mr. Newman.

Q. The more the snags lodge it does better for the channel?

A. They cut the channel deeper where lodged on a point.

Witness excused.

Mr. Robertson. We rest.

I hereby certify that the within is a true and correct transcript of my notes taken at the trial of the United States vs. The Bellingham Bay Boom Company.

ROLLAN M. PORTER.

Subscribed and sworn to before me this 4th day of June, A. D. 1895.

[Seal] C. A. PURARIRA,

County Clerk and Clerk of the Superior Court of Whatcom County, Washington.

[Endorsed]: Testimony. Filed Jun. 13, 1895. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Wednesday, July 10, 1895.

General Order Book, No. 3, page 305.

THE UNITED STATES OF AMERICA,
vs.
THE BELLINGHAM BAY BOOM CO.

Order of Submission.

Now, on this day, this cause coming on for final hearing, the Court, after hearing the argument of respective counsel, takes said matter under advisement.

UNITED STATES OF AMERICA.

(Coat of Arms.)

Department of Justice,
August 3d, 1895.

Pursuant to the act of Congress of February 22, 1849, I hereby certify that the annexed paper is a true copy of the original letter of the Attorney General of April 4, 1892, on file in this office.

In Witness Whereof, I have hereunto set my hand and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

Seal of Department of Justice.

EDWARD B. WHITNEY,
Acting Attorney General.

Letter from the Attorney General.

H. R. H. 3285-1892. DEPARTMENT OF JUSTICE Washington, D. C. A. D. R.

In correspondence on this subject quote the above initials and file number.

April 4, 1892.

Mr. PATRICK H. WINSTON, United States Attorney,
Spokane, Wash.

Sir: I transmit herewith papers from the War Department recommending that action be taken under the River and Harbor Act of September 19, 1890, against the Bellingham Bay Boom Company, for obstructing the navigation of the Nooksack River. You will please look into the matter, and if such course is just and expedient, take action as recommended; otherwise you will please report to me your views at once.

Respectfully,
W. H. H. MILLER,
Attorney General.

[Endorsed]: Certified copy letter of Atty. Genl. to U. S. Atty. Filed Feby. 20th, 1896. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.

Filed Feb'y 20, 1896.

Opinion.

W. H. Brinker, United States Attorney.

T. G. Newman, for Defendant.

HANFORD, District Judge:

This is a suit in equity, by the United States, brought under direction of the Attorney General, against the Bellingham Bay Boom Company, a corporation organized and existing under the laws of the State of Washington. The substantial averments of the bill are as follows:

That the Nooksack River is a navigable stream which empties into Puget Sound in Bellingham Bay, in the county of Whatcom, State of Washington, and its waters are navigable from its mouth a distance of several miles towards its source.

That the said defendant for a period of more than one

year last past, has maintained and continues to maintain an obstruction in the navigable waters of said river at and near where it empties into Bellingham Bay, as aforesaid, such obstruction consisting of a boom in which logs floated down said river are stopped and moored, the boom being constructed in such manner as to blockade the river during a large portion of the year, rendering navigation thereon impossible during said time.

That said river is used for navigation by steamboats and small craft, and that said defendant has not obtained permission of the secretary of war of the United States to continue or to maintain said boom, and the said boom was constructed and is maintained without the permission of the secretary of war, and is continued in said navigable waters aforesaid, without his consent.

The prayer of the bill is for a permanent injunction forbidding the further continuing or maintaining of said obstruction, or any part thereof, and for a mandatory injunction to cause the removal of said obstruction, and for general equitable relief.

The defensive matter contained in the answer is as follows:

The defendant says that it became incorporated in the month of June, 1890, under and by virtue of an act of the Legislature of the State of Washington, entitled "An act to declare and regulate the powers, rights and duties of corporations organized to build booms, and to catch logs and timber products thereof." That under and by virtue of the said act and articles of incorporation adopted thereunder power and authority were given defendant in the

waters of the Nooksack River in the State of Washington, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of the defendant in catching, booming, sorting, rafting and holding logs, lumber or other timber products, and to improve the Nooksack River so as to facilitate the business of logging, driving, rafting, sorting, booming and holding logs, and protecting from loss those engaged in carrying on the same.

That the construction and maintenance of defendant's boom was affirmatively authorized by the laws of the State of Washington in the month of June, A. D. 1890. That under and by virtue of said laws of the State of Washingington the said defendant, prior to the 19th day of September, A. D. 1890, did construct, erect and maintain its boom for the business purposes aforesaid, in strict accordance with the laws of the State of Washington, and not otherwise, at the mouth of the Nooksack River in the county of Whatcom, State of Washington, and has there continued to so maintain and operate its said boom up to this time. And defendant alleges that in the construction and maintenance of said boom it has expended a large sum of money, to-wit, the sum of fifty thousand dollars.

That the Nooksack River is a small stream lying wholly and entirely within the State of Washington, emptying its waters into Bellingham Bay, and navigable for but a few miles from its mouth by small, light draught water craft.

Defendant denies that its boom is constructed in such a

manner as to blockade said river during a large portion of the year, rendering navigation thereon impossible during said time; but alleges that at certain periods of the year, not to exceed twice in any one year, large quantities of brush, trees and drift are by freshets and excessive high water carried down to the mouth of said Nooksack River, where the said brush, trees and drift become lodged by reason of shoal water occasioned by the widening of said river and the deploying of its waters into the said Bellingham Bay. Defendant further alleges that under and by virtue of the power and authority to improve said river, vested in it by the laws of the State of Washington, it has from time to time, from the date of its incorporation up to the present time, and covering a period of more than four years, expended large sums of money, to-wit, the sum of twenty-five hundred dollars per year, in the purchase of powder, tools and labor for the improvement of said river, by removing the said brush, trees and drift, from the mouth thereof, and removing trees, snags and drift from the channel thereof to a distance of twenty miles from its mouth. Defendant further alleges that by reason of the location and maintenance of its boom and of the improvement of said river, made by the defendant as aforesaid, the navigation of said river for boats and water craft has been greatly facilitated, and that in the absence of such improvement to the navigation by defendant as aforesaid the mouth of said river would become entirely obstructed by brush, trees and drift, rendering navigation thereon totally impossible during the greater portion of the year.

* * * That immense forests of fir and cedar timber, of the market value of many million of dollars, which constitutes the chief wealth of Whatcom county, border and are tributary to the said Nooksack River and its branches, which said river is the natural and only outlet for most of said timber to the mills and market. That the commerce conducted and carried on upon said river by the transportation of goods, wares and merchandise is, and always has been, trifling and inconsiderable in amount, and in value greatly inferior to that of the logs and timber products floated down said river to the mills and market. * * * That during the four years last past, the total value of all such goods, wares and merchandise so transported upon said river has not amounted to more than five thousand dollars, and defendant alleges that the market value of the saw logs and timber products floated down said river and caught, sorted, boomed and rafted at defendant's boom during the same period amounts to ninety thousand dollars.

That the greatest and chief value of the said Nooksack River to the citizens of this and other states of the Union is its use as an outlet for floating saw logs and timber products to the mills and market. That none of the timber situate upon or tributary to the said river as aforesaid can be taken to the mills and market by floating down said river without the maintenance of a boom located at the mouth thereof for catching, sorting, booming, holding and rafting the same. That there are a number of saw and shingle mills located on the shores of Bellingham Bay, which are largely dependent for their supply of saw logs

upon logs floated down said river, and if deprived of such source of supply will suffer great damage and injury.

The defendant further alleges that it has at all times maintained and operated its said boom in accordance with the laws of the State of Washington thereunto pertaining, and has always exercised great care that its said boom should not interfere with the navigation of said Nooksack River by boats and water craft navigating the same. To this answer a general replication was filed.

The evidence has been taken before an examiner, and reported to the Court. At the time of introducing proofs it was stipulated between the parties that the Nooksack River is a navigable stream, having its source in Whatcom county, and running through Whatcom county to Bellingham Bay, emptying its waters into said bay, and is navigable from its mouth for a distance towards its source by light water craft, and said river is wholly within said county.

On the part of the government nineteen witnesses were called and sworn; two steamboat captains who have had practical experience in navigating the Nooksack River with small steamboats, one merchant, one proprietor of a sawmill, one fisherman, one schoolteacher, and a number of farmers and county officials. They all appear to have a general knowledge of the country through which the river flows, and the history of the settlement of the Nooksack valley. The testimony of said witnesses being in general to the effect that the piles driven to support the defendant's boom, and the boom itself, impedes the passage of steamboats, and that it has a tendency to collect

drift timber and cause shoaling at the mouth of the river by detaining the silt and sand, and causing the same to form a bar, and that navigation of the river by boats is interfered with by the bar and by jams of drift collecting therein, and by filling up of the channel.

For the defendant nine witnesses were sworn and have testified, including steamboat men, engineers and the persons who superintended the work done by the defendant in constructing the boom and clearing the river of jams and obstructions, and their testimony tends to prove the allegations of the defendant's answer as to the particular time when the boom was constructed, the condition of the river prior thereto, and the particular work and expenditures of the defendant in clearing the river of jams and keeping it open for navigation. As to these disputed facts the defendant's witnesses, having particular knowledge, are better able to testify intelligently, by reason of having made examinations and surveys, or being connected with the work done, than the witnesses for the government, who speak only from a general knowledge. No engineer has been called by the government to testify as to facts ascertained by an actual survey.

Upon consideration of all the evidence, I find that prior to the construction of the boom, trees and drift carried down the river by floods, formed jams which obstructed navigation, requiring labor and expense to keep the river open, and that the boom company have, since commencing to construct the boom, at an expense of many thousand dollars, cut out, blasted, and removed all drift which prior to the commencement of this suit lodged in the vicinity

of the boom and kept the mouth of the river clear of obstruction other than the boom itself, and the saw logs collected therein, and by such expenditures and work the company has rendered ample recompense for the impediment to navigation of the river by vessels caused by its boom.

The boom was constructed in the summer of 1890, and completed prior to the 19th day of September, 1890, the date of approval of the act of Congress, pursuant to which this suit was instituted; and the construction of the boom was duly authorized, as alleged in the answer, by an act of the Legislature of the State of Washington, approved March 17th, 1890, which act authorizes the incorporation of boom companies, and section 3 provides: "Such corporations shall have power and are hereby authorized, in any of the waters of this State, or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structures necessary or convenient for carrying on the business of such corporations." Laws of Washington, 1889-1890, 470.

By uncontradicted evidence it is shown that there are immense forests of timber which, when cut into saw logs, can be brought to market in the most convenient way by floating down the Nooksack River, the value of which is many times greater than the probable value of other products which may be transported upon the river, and to make the river available as a means for bringing timber to market it is necessary to maintain a boom at its mouth.

In view of all the facts, and considering that this river is wholly within this State, I hold: First, that the Legislature of the State had ample power prior to the enactment by Congress of the River and Harbor Act of September 19th, 1890, to authorize the construction of this boom, and that at the time of its construction it was authorized by law, and therefore not a nuisance nor an unlawful obstruction of navigation; and, in the second place, that the chief value of the Nooksack River as a highway is for the floating of saw logs, and that persons and corporations having occasion to use it for that purpose have rights equal to the rights of others to use the river as a highway for boats and vessels, and that a boom at the mouth of the river necessary for gathering and holding saw logs is to be regarded as an aid to the use of the river for a lawful purpose and entitled to protection the same as a wharf or pier constructed at a convenient place for the convenience of vessels. In the case of Pound vs. Turck, 95 U. S. 459-465, Mr. Justice Miller, in the opinion of the Court, says: "There are within the State of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the Legislature of the State may be most appro-

priately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognized the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local Legislature."

It was unnecessary for the defendant to obtain permission of the secretary of war to construct this boom for the very good reason that when it was constructed there was no law in existence requiring the permission of that officer. This bill seems to have been prepared under a supposition that the 7th section of the act of September 19th, 1890, entitled "An act making appropriation for the construction, repair, and preservation of certain public works on river and harbors, and for other purposes," 1 Supp R. S., 2nd ed., 800, is retroactive in its effect, or at least taken in connection with the 10th section of the same act, it renders all obstructions of navigable rivers not authorized by the secretary of war unlawful, and that the Circuit Court may require the same to be removed. But the 7th section from its words is clearly prospective, and must be so considered in its application to cases. And the 10th section does not make the maintenance of all previously constructed bridges, piers, docks, wharves, and similar structures erected for business purposes unlawful, nor authorize the removal of the same, but on the contrary

makes an exception which in my opinion includes the boom in question. The first clause of the section is as follows: "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited." And it is only the continuance of *such* obstructions, that is to say, any obstructions not affirmatively authorized by law, which are made unlawful by the act, and that part of the section authorizing the courts by injunction to prevent and remove obstructions in navigable rivers provides that "the creation and continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist." To bring the case within the law authorizing an injunction for the removal of this boom, it is necessary for the Court to find the same to be an unlawful obstruction. But the same having been affirmatively authorized by a valid law of this State at the time of its creation, and being lawfully in existence at the date of the act of Congress, the Court cannot so find, and is therefore without authority to command its removal.

Let there be a decree dismissing the suit.

C. H. HANFORD,
Judge.

[Endorsed]: Opinion. Filed Feby. 20, 1896. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.

Decree.

This cause came on for final hearing and was argued by counsel, and the Court upon due consideration of the pleadings and the evidence, and the arguments of counsel, doth now

Order, adjudge and decree that this suit be, and the same is, hereby dismissed.

Dated February 20th, 1896.

C. H. HANFORD,
Judge.

[Endorsed]: Decree. Filed Feby. 20, 1896. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the United States Circuit Court for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant

Assignment of Errors.

In the matter of the appeal of the above-named complainants from the final decree passed and entered against them in the above-entitled cause.

Assignment of Errors.

Come now the said United States of America, by Wm. H. Brinker, United States Attorney for the District of Washington, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this, to-wit:

I.

That the matters and facts alleged in the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of the answer filed in this cause are not sufficient to constitute any defense to the cause of action stated in plaintiff's complaint herein.

II.

That said Circuit Court erred in overruling the demurrer, and exceptions to said paragraphs two, three, four, five, six, seven, eight, nine, and ten of said answer.

III.

That said Court erred in finding and deciding that the value of timber products which are, and may be, floated down the Nooksack River is many times greater than the value of other products and merchandise which are and may be transported upon said river by maintaining a boom there for the purpose of handling said timber products.

IV.

That said Court erred in holding and deciding that the Legislature of the State of Washington had power to authorize the construction of defendant's boom in the manner the same was constructed.

V.

That said Court erred in holding and deciding that the chief value of the Nooksack River was as a highway for floating saw logs to market, and that the maintenance of a boom constructed as defendant's boom was constructed was a lawful structure and was authorized by law.

VI.

That said Court erred in holding and deciding that it was unnecessary for defendant to obtain permission from the secretary of war to construct its boom in the manner the same was constructed.

VII.

That said Court erred in holding and deciding that the 7th section of the act of Congress, approved on the 19th day of September, 1890, was prospective only in its operation.

VIII.

That said Court erred in holding and deciding that the 10th section of said act of September 19th, 1890, did not apply to the boom complained of in this cause.

IX.

That said Court erred in holding and deciding that said 10th section of said act of September 19th,1890, did not authorize the Court, by injunction, to prevent the continuance of the obstruction to said river caused by defendant's boom.

X.

That said Court erred in holding and deciding that the

construction and maintenance of said boom, as construct ed, was affirmatively authorized by a valid law of the State of Washington.

XI.

That said Court erred in holding and deciding that said boom, as constructed, was authorized by any law of the State of Washington.

XII.

That said Court erred in holding and deciding that defendant's said boom had been constructed, and was maintained, in accordance with the act of the Legislature of the State of Washington, approved on the 17th day of March, 1890.

XIII.

That said Court erred in deciding this cause in favor of defendant.

XIV.

That said Court erred in refusing to grant the injunction prayed for by the complainants in their bill, and also erred in dismissing said bill of complaint.

Wherefore, the said complainants pray that said judgment and decree of the said Circuit Court of the United States for the District of Washington be reversed, set aside and for naught held, and that this Honorable Court

upon full consideration of the record and evidence, order and direct the said Circuit Court to vacate and set aside its said final decree, and to grant to complainants the relief prayed for in their said bill of complaint.

WM. H. BRINKER,
United States Attorney for the District of Washington.
Appearing for Complainants.

[Endorsed]: Assignment of Erors. Original. Filed May 26, 1896. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Complainants,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.

Petition for and Notice of Appeal.

Now comes the United States of America, the above-named complainants, by Wm. H. Brinker, United States Attorney for the District of Washington, who appears in

this behalf and prosecutes this appeal, for and in the name of said complainants, by direction of the Department of Justice of the government of the United States, and say:

That they are aggrieved by the decision and decree rendered against them in this cause, and pray an appeal from the said decision and decree to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and that all pleadings, motions, demurrers, orders, record, evidence, statements of fact, documents, the final decree, the opinion of the Court, and the assignment of errors herein be transmitted to the said Circuit Court of Appeals, without delay; to the end that the said decision and decree may be reviewed, corrected and reversed, and that justice may be done in the premises.

And the said complainants now, and hereby, give notice to the said Circuit Court and to the said defendant of said appeal.

WM. H. BRINKER,

United States Attorney, Appearing for Said Complainants.

[Endorsed]: Petition and notice of appeal. Filed May 26, 1896. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
Complainants,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.

Order Allowing Appeal.

Now come the complainants by Wm. H. Brinker, United States Attorney for the District of Washington, who appears for the said complainants by direction of the Department of Justice, and present to the Court their petition and notice praying an appeal from the decision and decree rendered against them in this cause, to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and also present and file their assignment of errors in this cause.

The Court having seen, heard and examined said petition for appeal, and notice thereof, and having carefully considered the same and being fully advised in the premises,

It is ordered that the prayer of said petition be, and the same is, hereby granted, and an appeal allowed to said Circuit Court of Appeals as prayed.

It is further ordered that the clerk of this court prepare and transmit to the clerk of said Circuit Court of Appeals, without delay, the record, pleadings, evidence, demurrer, all motions, statements of fact, opinion, decree, and the assignment of errors in this cause.

Done in open court, in the city of Seattle, in the District of Washington, this 26th day of May, 1896.

C. H. HANFORD,

United States District Judge, Presiding in Said Circuit Court.

[Endorsed]: Order granting appeal. Original. Filed May 26, 1896. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.

Citation (Copy.)

By the Honorable C. H. HANFORD, one of the Judges of the Circuit Court of the United States, for the District of Washington.

To the Bellingham Bay Boom Company, a Corporation, and to Thomas G. Newman, Esquire, its Solicitor:

Whereas the United States of America have lately appealed to the Circuit Court of Appeals, of the Ninth Circuit, of the United States of America, from a decree lately rendered in the Circuit Court of the United States for the District of Washington, in the Northern Division thereof, made in favor of you, the said Bellingham Bay Boom Company, a corporation, said appeal having been directed to be taken by the Department of Justice of the United States of America,

You are, therefore, hereby cited to appear before the Circuit Court of Appeals of the United States, for the Ninth Circuit, in the city of San Francisco, in the State of California, within thirty days from this date, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Seattle, in the District of Washington, in the Ninth Circuit, this 26th day of May, in the year of our Lord, one thousand eight hundred and ninety-six.

[Seal U. S. Circuit Court for the District of Washington.] C. H. HANFORD,

U. S. Dist. Judge, Presiding in Said Circuit Court.

I hereby certify that I personally served the within citation on the Bellingham Bay Boom Company, by delivering to and leaving with E. M. Wilson, President of the Bellingham Bay Boom Company, at the city of Fairhaven, Whatcom County, State of Washington on the 28th day of May, 1896, a duly certified copy of the within citation certified to by the clerk of the United States

Circuit Court. I further certify that on the 28th day of May, 1896, I served the within citation on Thomas G. Newman, solicitor of the Bellingham Bay Boom Company, by delivering to and leaving with him a duly certified copy of the within citation certified to by clerk U. S. Court at New Whatcom, Whatcom Co., State of Washington.

Dated at Seattle this 29th day of May, 1896.

Marshal's fees, $20.24-100

JAMES C. DRAKE,
U. S. Marshal.
By Geo. W. Curtis,
Deputy Marshal.

[Endorsed]: Citation. Filed June 1, 1896. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

UNITED STATES OF AMERICA
vs.
BELLINGHAM BAY BOOM CO. } No. 163.

Order Transmitting Original Exhibits.

Now, on this 19th day of June, 1896, it appearing to the Court that it is impracticable to incorporate in the trans-

cript upon appeal in this cause, to the Circuit Court of Appeals, copies of the exhibits used upon the trial of this cause, it is, therefore, hereby

Ordered, that the clerk of this court transmit all original exhibits to said Circuit Court of Appeals, there to be inspected and considered, together with the transcript on appeal in this cause. The exhibits hereinabove referred to being Plaintiff's Exhibits "A," "B," and "E," and Defendant's Exhibits "1," "2," "3," and "4."

C. H. HANFORD,
Judge.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

THE UNITED STATES OF AMERICA,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Appellee.

United States of America,
District of Washington. } ss.

Clerk's Certificate to Transcript.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, Ninth Ju-

dicial Circuit, do hereby certify the foregoing three hundred and thirty-four (334) typewritten and written pages, numbered from one (1) to three hundred and thirty-four (334), inclusive, to be a full, true and correct copy of the record and all proceedings had in the foregoing and within-entitled cause, as the same remains of record and on file in the office of the clerk of said Circuit Court at Seattle, in said District of Washington, and that the same constitutes the transcript of the record in this cause upon appeal from the said Circuit Court of the United States for the District of Washington to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, save and excepting the original exhibits, which by the order of Court I have this day transmitted to the clerk of the said Circuit Court of Appeals, as by order I am so directed to do, which said order will be found on page three hundred and thirty-four (334) of said transcript on appeal.

I further certify that the cost of preparing and certifying the transcript of the record on appeal in this cause amounts to the sum of one hundred and sixty dollars and seventy cents ($160.70), and that the said sum will be charged by me against the United States, appellant, in my quarterly account against the United States for the quarter ending June 30, 1896.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 19th day of June, A. D. 1896.

[Seal] A. REEVES AYRES,

Clerk of the United States Circuit Court, District of Washington.

By R. M. Hopkins,

Deputy Clerk.

In the Circuit Court of the United States for the District of Washington, Northern Division, Ninth Circuit.

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a Corporation,
Defendant.

Citation (Original.)

By the Honorable C. H. HANFORD, one of the Judges of the Circuit Court of the United States, for the District of Washington.

To the Bellingham Bay Boom Company, a Corporation, and to Thomas G. Newman, Esquire, its Solicitor.

Whereas the United States of America have lately appealed to the Circuit Court of Appeals of the Ninth Circuit of the United States of America from a decree lately rendered in the Circuit Court of the United States for the District of Washington, in the Northern Division thereof, made in favor of you, the said Bellingham Bay Boom Company, a corporation, said appeal having been directed to be taken by the Department of Justice of the United States of America,

You are, therefore, hereby cited to appear before the Circuit Court of Appeals of the United States, for the Ninth Circuit, in the city of San Francisco, in the State of California, within thirty days from this date, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Seattle, in the District of Washington, in the Ninth Circuit, this 26th day of May, in the year of our Lord, one thousand eight hundred and ninety-six.

[Seal] C. H. HANFORD,
U. S. Dist. Judge, Presiding in said Circuit Court.

Marshal's Return.

I hereby certify that I personally served the within citation on the Bellingham Bay Boom Company, by delivering to and leaving with E. M. Wilson, president of the Bellingham Bay Boom Company, at the city of Fairhaven, Whatcom County, State of Washington, on the 28th day of May, 1896, a duly certified copy of the within citation, certified to by the clerk of the United States Circuit Court. I further certify that on the 28th day of May, 1896, I served the within citation on Thomas G. Newman, solicitor for the Bellingham Bay Boom Co., by delivering to and leaving with him a duly certified copy

of the within citation, certified to by clerk U. S. Court, at New Whatcom, Whatcom Co., State of Washington.

Dated at Seattle this 29th day of May, 1896.

Marshal's fees, $20.24-100.

JAMES C. DRAKE,
U. S. Marshal.

By Geo. W. Curtis,
Deputy Marshal.

[Endorsed]: Filed June 1st, 1896. In the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

No. 308. United States Circuit Court of Appeals, for the Ninth Circuit. The United States of America, Appellants, vs. Bellingham Bay Boom Land Company. Transcript of Record. Appeal from the United States Circuit Court, District of Washington, Northern Division.

Filed June 24, 1896.

F. D. MONCKTON,
Clerk.

In the Circuit Court of the United States in and for the District of Washington, Northern Division.

UNITED STATES OF AMERICA,
Appellant,

vs.

BELLINGHAM BAY BOOM COMPANY, a Corporation,
Appellee.

United States of America,
District of Washington. } ss.

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit, do hereby certify that the foregoing and hereto attached paper writings and maps are the original and all of the original exhibits introduced in evidence upon the trial in this cause and that the same are the exhibits which by order of the Court for this Circuit I have this day transmitted to the clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit, which said order will be found on page 334 of the transcript of the record on appeal in this cause.

In Testimony Whereof, I have hereunto set my hand

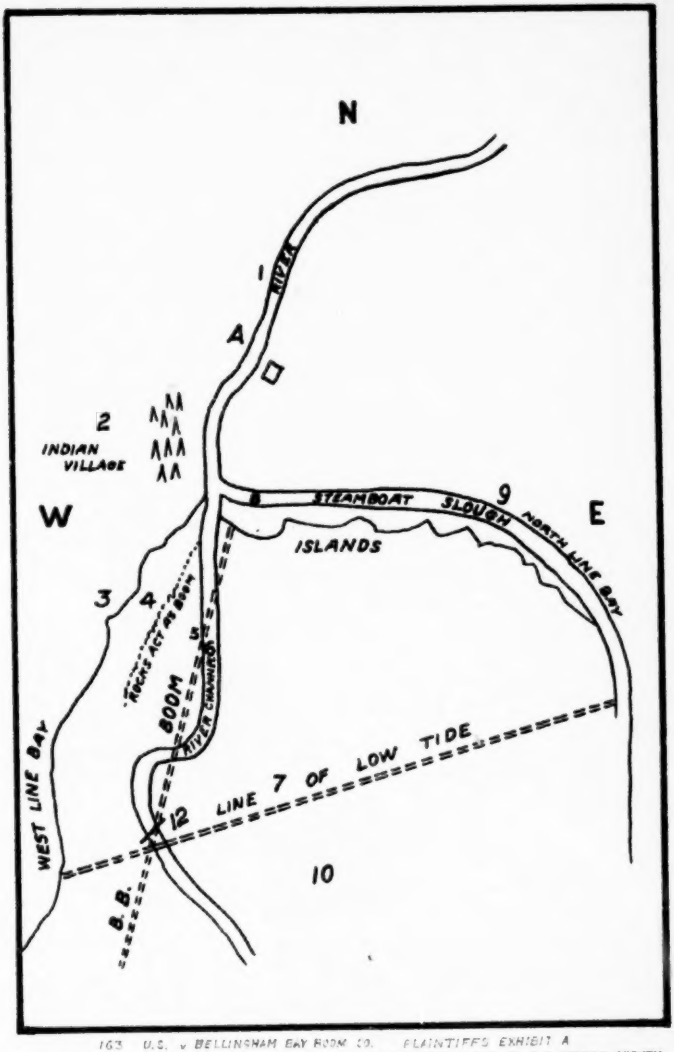
and affixed the seal of said Circuit Court, this 19th day of June, A. D. 1896.

A. REEVES AYERS.

Clerk of the United States Circuit Court, District of Washington.

By R. M. Hopkins,
Deputy Clerk.

PLAINTIFFS EXHIBIT A



163 U.S. v BELLINGHAM BAY BOOM CO. PLAINTIFFS EXHIBIT A
FILED JUNE 13-1895 IN THE U.S. CIRCUIT COURT. A REEVES AYRES, CLERK. BY R.M. HOPKINS, DEPUTY.

Defendant's Exhibit, No. 2.

AMENDMENT OF ARTICLES OF INCORPORATION OF THE BELLINGHAM BAY BOOM COMPANY.

State of Washington, } ss.
County of Whatcom. }

We, George A. Black and E. M. Wilson, being duly sworn, on our oaths state:

That we acted as chairman and secretary, respectively, of a meeting of all the stockholders of the Bellingham Bay Boom Company, at Fairhaven, Washington, held on the fifth day of August, 1890, called for the purpose of amending the Articles of Incorporation of the said Company, by increasing its capital stock and enlarging its corporate powers, pursuant to notice regularly given as by law provided in such cases.

None of the capital stock of the aforesaid corporation has been actually paid in, and there are no debts and liabilities.

Affiants further state that at the aforesaid meeting the capital stock of the said corporation was increased in the amount of eight hundred thousand (800,000) dollars, by unanimous vote, of all of the shares of stock of said Company, and article III of the original Articles of Incorporation was amended to read as follows, to-wit:

Article III.

The capital stock of this Company shall be one million (1,000,000) dollars, which said capital stock shall be divided into ten thousand (10,000) shares, of the par value of one hundred (100) dollars each.

Affiants further state that at the aforesaid meeting article IV of the original Articles of Incorporation was amended to read as follows, to-wit:

Article IV.

The business of this corporation shall be to catch, drive, boom, sort, raft, and hold logs, lumber and other timber products within the State of Washington; and for that purpose it shall have the power to acquire, hold, use and transfer all such real and personal property, by lease, purchase or otherwise, as shall be necessary or convenient in carrying on the business of the corporation. It shall have the power to tow and deliver logs, and for that purpose may own, build, buy, sell or lease all necessary boats and watercraft. It shall have the power to construct, maintain and use all necessary sheer of receiving booms, dolphins, piers, piles or other structures necessary or convenient in carrying on the business of this corporation. It shall have the power to improve the lakes, rivers, streams and waters of the State of Washington so as to facilitate the business of logging, driving, rafting, sorting, booming and holding logs and protecting from loss those engaged in carrying on the same. It shall have the power

to buy and sell timber lands, timber and timber products, either on behalf of the Company or as agent; to loan money to loggers or others engaged in the business of handling timber land, timber or timber products; and to do all and anything connected with, pertaining to, or convenient for the conduct of the business of this corporation.

Affiants further state that at the aforesaid meeting Article V of the original Articles of Incorporation was amended to read as follows, to-wit:

Article V.

The Board of Trustees of this corporation shall consist of five persons, and there is hereby named George A. Black, E. M. Wilson, E. L. Cowgill, H. Y. Thompson and T. G. Newman, who shall have the management of the business of this corporation for the first six months of its existence and thereafter its trustees shall be elected by the stockholders according to law.

In Witness Whereof, we have hereunto set our hands, this fifth day of August, 1890.

GEO. A. BLACK,
Chairman.

E. M. WILSON,
Secretary.

Subscribed and sworn to before me by the said George A. Black and E. M. Wilson this fifth day of August, 1890.

EDGAR H. HOLBROOK,
Notary Public in and for State of Washington.

{Edgar H. Holbrook, Expiration of Commission, Jan. 12, 1894. Notary Public, State of Washington.}

We, the undersigned, being all of the Trustees of the Bellingham Bay Boom Company, hereby certify that the facts stated in the foregoing affidavit are true, as we verily believe, and are founded upon the records of said Company.

GEO. A. BLACK.
E. M. WILSON,
GEO. A. BLACK,
E. L. COWGILL,
H. Y. THOMPSON.

[Endorsed]: 163. Bellingham Bay Boom Company. Defendant's Exhibit No. 2. Filed June 13, 1895. In the United States Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Defendant's Exhibit, No. 3.

ARTICLES OF INCORPORATION OF THE BELLINGHAM BAY BOOM COMPANY.

The undersigned, George A. Black, E. M. Wilson, E. L. Cowgill and H. Y. Thompson do hereby form themselves into a body corporate under the laws of the State of Washington, for the purposes and with the powers hereinafter set forth.

Article I.

The name of this corporation shall be the Bellingham

Bay Boom Company, and its duration shall be fifty (50) years.

Article II.

The principal office and place of business of this corporation shall be at the city of Fairhaven in the county of Whatcom, and State of Washington.

Article III.

The capital stock of this corporation shall be two hundred thousand (200,000) dollars, which said capital stock shall be divided into two thousand (2,000) shares, of the par value of one hundred (100) dollars each share.

Article IV.

The business of this corporation shall be to catch, boom, sort, raft and hold logs, lumber and other timber products within the State of Washington; and for that purpose it shall have the power to acquire, hold, use and transfer all such real and personal property, by lease, purchase or otherwise, as shall be necessary or convenient in carrying on the business of the corporation. It shall have the power to to wand deliver logs, and for that purpose may own, build, buy, sell or lease all necessary boats and water-craft,. It shall have the power to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structures necessary or convenient in carrying on the business of this corporation.

Article V.

The Board of Trustees of this corporation shall consist of four persons and there is hereby named George A. Black, E. M. Wilson, E. L. Cowgill and H. Y. Thompson, as Trustees who shall have the management of the business of this corporation for the first six months of its existence, and thereafter its trustees shall be elected by the stockholders according to law.

In Witness Whereof, we have hereunto set our hands and seals this 26 day of May, 1890.

GEO. A. BLACK.
E. M. WILSON.
H. Y. THOMPSON.
E. L. COWGILL.

Witness:
W. L. READ.
EDGAR H. HOLBROOK.

State of Washington, } ss.
County of Whatcom. }

Be it remembered that on this 26 day of May, 1890, personally appeared before me the above-named George A. Black, E. M. Wilson, E. L. Cowgill and H. Y. Thompson, each of whom is personally known to me to be the identical person described in and who executed the foregoing articles of incorporation, and they each severally acknowl-

edged to me that they executed the same freely and voluntarily, and for the uses and purposes therein set forth.

Witness my hand and official seal, this 26 day of May, 1890.

{Edgar H. Holbrook, Expiration of Commission, Jan. 1, 1-91. Notary Public, State of Washington.}

EDGAR H. HOLBROOK,
Notary Public in and for the
State of Washington.

[Endorsed]: 163. U. S. v. Bellingham Bay Boom Co. Defendant's Exhibit No. 3. Filed June 13, 1895. In the United States Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

368 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
v.
THE BELLINGHAM BAY BOOM COMPANY, APPELLEES. } No. 308.

Appeal from the circuit court of the United States for the district of Washington, northern division.

William H. Brinker, U. S. atty., for appellants; Thomas R. Shepard and Thomas G. Newman, for appellees.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, district judge. This is a suit in equity, brought under the direction of the Attorney-General to enjoin The Bellingham Bay Boom Company, appellee, from maintaining a boom in Nooksack River, in the State of Washington, and for a decree requiring the removal of such obstruction. The Nooksack River is a navigable stream, having its source in Whatcom Co., Washington, running through said county and emptying its waters into Bellingham Bay, and is navigable from its mouth for a distance of several miles towards its source by steamboats and light water craft. There are settlements, farms, and towns along the river, and prior to the construction of the boom and afterwards there was more or less traffic by steamboats plying between the towns and settle-
369 ments along the river carrying in merchandise and carrying out farm products. These settlements are increasing every year. There are also along the river immense forests of timber, which, when cut up into saw logs, can be brought to market by floating them down the river, and to make the river available for this purpose it is necessary to maintain a boom at the mouth of the river.

The circuit court found that the value of this timber was much greater than the value of the other products transported upon the river.

A number of witnesses testified, on behalf of the appellants, to the effect that the boom, with the piles driven to support it, had a tendency to collect drift timber and cause shoaling at the mouth of the river by detaining the silt and sand and causing the same to form a bar, and that the navigation of the river by boats is interfered with by the bar and by jams of drift collected therein and by the filling up of the channel. On the other hand, several witnesses testified, on behalf of the appellee, that said boom is not so constructed as to render navigation thereon impossible during any considerable portion of the year. They admit that at certain periods of the year large quantities of brush, trees, and drift are, by freshets and high water, carried down to the mouth of the river, where the same become lodged by reason of shoal water; that the appellee has expended and does expend large sums of money every year for the improvement of said river by removing the brush, trees, and drift from the mouth thereof and from the channel of the river for several miles from its mouth; that by reason of such improvements and of the location and maintenance of the boom the navigation on said river of boats and water craft has been greatly facilitated.

The circuit court expressed the opinion that, as to the disputed
370 facts, the witnesses for the appellee had more actual knowledge and were better able to know the facts, by reason of having been connected with the works and having made examinations and surveys, than the witnesses for the appellants, who testified only from a general knowledge.

The testimony is uncontradicted that prior to the construction of the boom the trees and drift carried down the river by floods formed jams which obstructed navigation, requiring much labor and expense to keep the river open, and the court found that since the construction of the boom the appellee, at an expense of several thousand dollars, had kept the mouth of the river clear of obstructions—other than the boom itself and saw logs collected therein—and that by such expenditures had rendered ample recompense for the impediment to navigation of the river by boats caused by its boom. The circuit court dismissed the bill.

It is contended by appellants that for more than a year prior to the commencement of this suit (May 2, 1890) the appellee maintained, and continues to maintain, an obstruction in the navigable waters of said river in such manner as to blockade the river during a large portion of the year, rendering navigation thereon impossible, without obtaining permission from the Secretary of War to continue or to maintain said boom.

This suit is brought in pursuance of the provisions of an act of Congress "making appropriation for the construction, repair, and preservation of its public works on rivers and harbors, and for other purposes," approved September 19, 1890 (26 Stat., 426, 465), section 7 of which provides that it shall not be lawful to build structures which may obstruct or impede the navigable waters of the United States, unless permission of the Secretary of War has been first obtained.

371 Section 10 of the act reads as follows:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks, and wharves, and similar structures, erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. * * * The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist, and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States."

The boom in question was constructed in the summer of 1890 and was fully completed prior to the 19th of September, 1890. The contention of the appellee is that it had the right to construct and has the right to maintain said boom under the provisions of an act of the legislature of the State of Washington entitled "An act to declare and regulate the powers, rights, and duties of corporations organized to build booms and to catch logs and timber products therein," approved March 17, 1890. (Laws of Washington, 1889–90, 471.)

Section 3 of this act provides that "such corporations shall have the power and are hereby authorized, in any of the waters of this State, or the

dividing waters thereof, to construct, maintain, and use all necessary sheer or receiving booms, dolphins, piers, piles, or other structure necessary or convenient for carrying on the business of such corpora-
372 tions: Provided, That such boom or booms, sheer booms, or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels, or steam crafts of any kind whatsoever, or for ordinary purposes of navigation." (1 Hill, Ann. Stat. Wash., sec. 1592.)

It is conceded by appellants that, in the absence of any Congressional legislation upon the subject, the States possess plenary power by appropriate enactments to authorize the obstruction of navigable streams which exist within the State; but the contention is that there had been Congressional legislation, prior to the passage of the act of the State of Washington, appropriating money for the survey and improvement of the river (23 Stat., 144; 24 Stat., 327; 25 Stat., 423) and that the object and purpose of Congress to continue such improvement has never been abandoned. (26 Stat., 452, 464; 27 Stat., 115; 28 Stat., 371; 29 Stat., 234.)

It is argued that the sole object of Congress in making these appropriations was to regulate and promote commerce, which was clearly within its constitutional power. This contention is not sustained by the authorities. The acts of Congress making appropriations for the improvement of the river imposed no inhibition upon the legislature of the State which prevented the construction under State authority of booms, dams, piers, or bridges upon the river. The power of Congress to pass laws for the regulation of the navigation on rivers and to prevent any and all obstructions therein is not questioned. The law, however, is well settled that there must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the
373 States. Such obstructions and nuisances are offenses against the laws of the State within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against the United States laws which do not exist; and none such exist except what are to be found on the statute book.

(Wilson v. Blackbird Creek Marsh Co., 2 Pet., 245, 252; Gilman v. Philadelphia, 3 Wall., 713, 727; Passaic Bridges, 3 Wall. (App.), 782, 793; Pound v. Turck, 95 U. S., 459; Escanaba Co. v. Chicago, 107 U. S., 678, 683; Cardwell v. American Bridge Co., 113 U. S., 205, 208; Willamette Iron Bridge Co. v. Hatch, 125 U. S., 1, 8.)

In Wilson v. Blackbird Creek Marsh Company, supra, the legislature of the State of Delaware authorized the construction of a dam across a creek for the purpose of reclaiming some marsh land, and thereby improving the health of the inhabitants. Chief Justice Marshal, in delivering the opinion of the court, said: "The act of assembly by which the plaintiffs were authorized to construct their dam shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure

authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." He further said that if Congress had passed any act which bore upon the case,
374 any act in execution of the power to regulate commerce, the object of which was to control the State legislation over those small navigable streams into which the tide flows, the State law would be void; but that as no such action had been taken by Congress the act of the State was not repugnant to the power to regulate commerce in its dormant state.

In Pound v. Turck, supra, which was an action for damages occasioned by the construction and maintenance of a boom over the Chippewa River, a navigable stream in the State of Wisconsin, the court, after referring to the Blackbird Creek Marsh Company and other cases, said:

"The present case falls directly within the principle established by these cases and aptly illustrates its wisdom. There are within the State of Wisconsin, and perhaps other States, many small streams, navigable for a short distance from their mouths, in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, &c. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, &c., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exer-
375 cise of this limited power may all the more safely be confided to the local legislatures."

At the time of the passage of the law by the State of Washington and of the construction of the boom, there was no direct statute of the United States prohibiting the construction or maintenance of such booms in the inland rivers of the State. The adoption of section 10 of the act of Congress was an exercise of its constitutional right to regulate commerce between the States. The object was to take control of the navigable waters of the United States so as to protect the interests of the Government and prevent obstructions to the free navigation of said waters. It was intended to apply to all cases where the States had failed to pass any laws in regard thereto and to prohibit obstructions not authorized by law. But it was not intended by Congress to be retroactive in its results. This is made perfectly clear from the fact that by its terms it is made applicable only to such obstructions as were "not affirmatively authorized by law." Congress recognized that, in the exercise of the legitimate powers of the State government, acts had been passed allowing individuals and corporations to build and construct booms, wharves, piers, and other structures, upon the rivers, and it was not the intention of Congress

to interfere with such works as had been "affirmatively authorized by law," either by the legislature of the State or by acts of Congress.

In United States v. Burns, 54 Fed., 351, 362, the court, speaking of the act of Congress under consideration, said:

"What is it that the Congress has prohibited by the tenth section? All obstructions to the navigable capacity of the river are not prohibited, but only those 'not affirmatively authorized by law.' This legislation, in effect, concedes that which is well known to be true, that the
376 necessities of commerce, the interests of the country, demand that certain obstructions to the navigable capacity of our rivers must be authorized and their creation permitted. Under certain circumstances, bridges, piers, docks, dams, and booms, the object of which is to facilitate trade and commerce, become in many instances serious obstructions to the navigable capacity of our waters, and yet they are 'affirmatively authorized by law.'"

It is argued by appellants' counsel that, admitting the laws of the State of Washington to be valid, still the boom in question was not constructed as authorized by the statutes of the State of Washington, and for that reason it is claimed that as constructed "it was not affirmatively authorized by a valid law, or by any law whatever; but, on the contrary, it was constructed and maintained in direct violation of the law which gave defendant its being." That is a matter between the corporation and the power that created it. The question whether or not the boom was constructed in strict accordance with the terms and provisions contained in the statute of Washington cannot be considered by this court. That question is one to be determined by the State, not by the Federal court. This is settled by the decision of the Supreme Court in the case of Willamette Iron Bridge Co. v. Hatch, supra, where the court in considering this matter said: "Whether they are conformable or not conformable to the State law relied on is a State question, not a Federal one. The failure of the State functionaries to prosecute for breaches of the State law does not confer power upon the United States functionaries to prosecute under a United States law when there is no such law in existence." (See also Heerman v. Beef Slough M. Co., 1 Fed., 145, 156-7.)

377 The views herein expressed are conclusive of this case. It is therefore unnecessary to discuss other questions argued by the respective counsel.

The judgment of the circuit court is affirmed.

(Endorsed:) Opinion. Filed June 28, 1897. F. D. Monckton, clerk.

378 United States circuit court of appeals for the ninth circuit. No. 308. October term, 1896.

THE UNITED STATES OF AMERICA, APPELLANTS,
v.
THE BELLINGHAM BAY BOOM COMPANY, APPELLEE.

Appeal from the circuit court of the United States for the district of Washington, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, northern division, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed June 28, 1897. F. D. Monckton, clerk.

379 In the United States circuit court of appeals for the ninth circuit.
In equity.

THE UNITED STATES OF AMERICA, COMPLAINANTS and appellants,
vs.
THE BELLINGHAM BAY BOOM COMPANY, A CORPORATION, defendant and appellee. } No.

Petition for & notice of appeal.

To the honorable the United States circuit court of appeals for the ninth circuit, and to the Honorable W. B. Gilbert, Erskine M. Ross, and William W. Morrow, judges thereof:

Now come the United States of America, the above named complainants and appellants, by Wm. H. Brinker, United States attorney for the district of Washington, who appears in this behalf and prosecutes this appeal for and in the name of said complainants by direction of the Attorney-General, the head of the Department of Justice of the Government of the United States, and say:

That they are aggrieved by the decision and decree rendered against them in this cause and pray that an appeal be allowed to them from the said decision and decree to the Supreme Court of the United States, and that all pleadings, motions, demurrers, orders, record, evidence, statements of fact, documents, briefs, the final decree, the opinion of the said circuit court of appeals, and the assignment of errors filed herein be transmitted without delay to the Supreme Court of the United States, to the end that the said decision and decree may be reviewed, cor-
380 rected, and reversed, and that justice may be done in the premises.

And the said complainants now and hereby give notice to the said circuit court of appeals and to the said defendant of said appeal.

WM. H. BRINKER,
United States Attorney for the District of Washington,
Appearing for said Complainants.

(Endorsed:) Petition and notice of appeals. Filed Aug. 11, 1897. F. D. Monckton, clerk.

381 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANTS and appellants,
vs.
THE BELLINGHAM BAY BOOM COMPANY, A corporation, defendant and appellee. } In Equity. No. ——.

In the matter of the appeal of the above-named complainants from the final decision and decree passed and entered against them in the above-entitled cause.

Assignment of errors.

Come now the United States of America, by Wm. H. Brinker, United States attorney for the district of Washington, and having prayed an appeal from the decision and decree rendered against them in this cause in the United States circuit court of appeals for the ninth circuit, present and file their assignment of errors herein, and show that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the matters and facts alleged in the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth paragraphs of the answer filed in this cause are not sufficient to constitute any defense to the cause of action stated in complainants' bill of complaint herein.

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II.

That the said circuit court of appeals erred in affirming the judgment of the circuit court of the United States for the district of Washington in overruling the demurrer and exceptions of the complainants to paragraphs two, three, four, five, six, seven, eight, nine, and ten of the answer filed in said cause.

III.

That the said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington in finding and deciding that the value of the timber products which are or may be floated down the Nooksack River is many times greater than the value of other products and merchandise which are and may be transported upon said river, and that it was necessary to maintain the boom thereon for the purpose of handling said timber products; and said circuit court of appeals also erred in affirming the judgment of said circuit court of the district of Washington in finding and deciding that the comparative value of said products was a material and important question in this cause.

IV.

That the said circuit court of appeals erred in affirming the judgment and decision of said circuit court for the district of Washington in holding and deciding that the legislature of the State of Washington had power to authorize the construction of defendant's boom in the manner the same was constructed and maintained.

V.

That the said circuit court of appeals erred in affirming the
383 judgment of said circuit court for the district of Washington in holding and deciding that the chief value of the Nooksack River was as a highway for floating logs to market, and that the maintenance of a boom, constructed as defendant's boom was constructed, was a lawful structure and was authorized by law.

VI.

That said circuit court of appeals erred in affirming the judgment and decision of said circuit court for the district of Washington in holding and deciding that it was unnecessary for the defendant to obtain permission from the Secretary of War to construct or maintain its boom in the manner the same was constructed and maintained.

VII.

That said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington in holding and deciding that the seventh section of the act of Congress approved on the 19th day of September, 1890, was prospective only in its operation.

VIII.

That said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington in holding and deciding that the tenth section of said act of September 19th, 1890, did not apply to the boom complained of in this cause.

IX.

That the said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington in holding and deciding that said tenth section of said act of September 19th, 1890, did not authorize the court by injunction to prevent the continuance of
384 the obstruction to said river caused by defendant's boom.

X.

That said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington in holding and deciding that the construction and maintenance of said boom as constructed was affirmatively authorized by a valid law of the State of Washington.

XI.

That the said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington in holding and deciding that said boom as constructed was authorized by any law of the State of Washington.

XII.

That said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington in holding and deciding that the defendant's boom had been constructed and was maintained in accordance with the act of the legislature of the State of Washington approved on the 17th day of March, 1890.

XIII.

That the said circuit court of appeals erred in affirming the judgment of the said circuit court for the district of Washington in holding and deciding that in order to make the Nooksack River valuable for the purpose of floating saw logs thereon, it was necessary to maintain a boom at the mouth of the river in the manner and form as said boom was constructed and maintained by the defendant.

XIV.

That the said circuit court of appeals erred in affirming the judg-
385 ment of said circuit court for the district of Washington in finding and deciding that by reason of the improvements made by defendant in said river, and of the location and maintenance of its said boom, the navigation of said river by boats and water craft has been greatly facilitated.

XV.

That the said circuit court of appeals erred in affirming the judgment of the said circuit court for the district of Washington, in finding and deciding that the testimony is uncontradicted that prior to the construction of the boom the trees and drift carried down the river by floods formed jams which obstructed navigation, requiring much labor and expense to keep the river open, and that since the construction of said boom the defendant, at an expense of several thousand dollars, had kept the mouth of the river clear of obstructions, other than the boom itself and saw-logs collected therein, and that, by such expenditures, had rendered ample recompense for the impediment to navigation of the river by boats, caused by said boom.

XVI.

That the said circuit court of appeals erred in affirming the judgment of said circuit court for the district of Washington, holding and deciding that the said boom, as constructed, was a structure similar to bridges, piers, docks, and wharves, and was embraced within the exception in said tenth section of said act of Congress of September 19, 1890.

XVII.

That the said circuit court of appeals erred in holding and deciding that the acts of Congress making appropriations for the improvement of said Nooksack River imposed no inhibition upon the legislature
386 of the State which prevented the construction, under State authority, of the boom in question.

XVIII.

That the said circuit court of appeals erred in holding and deciding that the obstruction complained of in this cause is an offense against the laws of the State, but is not an offense against the laws of the United States.

XIX.

That the said circuit court of appeals erred in holding and deciding that there exists no law of the United States making the construction or maintenance of the boom in question in this case an offense.

XX.

That the said circuit court of appeals erred in holding and deciding that the prohibition by Congress by section ten of said act of September 19, 1890, was intended to apply only to cases where the States had failed to pass any law in regard thereto.

XXI.

That the said circuit court of appeals erred in holding and deciding that said section ten of said act of Congress of September 19th, 1890, was not intended by Congress to be retroactive in its operation or in its results.

XXII.

That the said circuit court of appeals erred in holding and deciding that the question whether the defendant's boom was constructed and maintained in violation of the law of the State was a matter between the defendant corporation and the State that created it, and that the question whether or not the said boom was constructed in strict accordance with the terms and provisions contained in the statute of Washington
387 could not be considered by said court of appeals; that said question was one to be determined by the State court, and not by the Federal court.

XXIII.

That the said circuit court of appeals erred in deciding this cause in favor of the defendant and in affirming the judgment of said circuit court for the district of Washington.

XXIV.

That the said circuit court of appeals erred in refusing to reverse the judgment of the said circuit court for the district of Washington in denying the injunction prayed for by the complainants in their bill, and also in dismissing said bill of the complainants.

Wherefore, the said complainants pray that such judgment and decree of the said circuit court of appeals of the United States for the ninth circuit thereof be reversed, set aside, and for naught held; and that this honorable court, upon full consideration of the record and evidence, order and direct the said circuit court of appeals to vacate and set aside its said final decree and also to reverse the judgment and decree of the said circuit court for the district of Washington, and to order and direct the said circuit court to vacate and set aside its said final decree, and to grant the complainants the relief prayed for in their said bill of complaint.

WM. H. BRINKER,
United States Attorney for the District of Washington, for Appellants.

(Endorsed:) Assignment of errors. Filed Aug. 11, 1897. F. D. Monckton, clerk.

388 In the United States circuit court of appeals for the ninth circuit.
In equity.

THE UNITED STATES OF AMERICA, complainants and appellants, *vs.* THE BELLINGHAM BAY BOOM COMPANY, a corporation, defendant and appellee.	No. 308.

Now come the complainants, by Wm. H. Brinker, United States attorney for the district of Washington, who appears for the said complainants and prosecutes an appeal herein by direction of the Attorney-General of the United States, the head of the Department of Justice of the Government of the United States, and present to the court and to the judges thereof their petition and notice praying an appeal from the decision and decree rendered against them in this cause to the Supreme Court of the United States, and file their assignment of errors in this cause; and the said petition for appeal and the notice thereof having been seen, heard, and examined, and having been fully considered by the undersigned judges of said court:

It is ordered that the prayer of said petition be, and the same is hereby, granted, and an appeal allowed in said cause to the Supreme Court of the United States, as prayed.

It is further ordered that the clerk of this court prepare and transmit to the clerk of the said Supreme Court, without delay, the record, pleadings, evidence, demurrer, all motions, statements of fact, opinion of the circuit court for the district of Washington, opinion of the circuit
389 court of appeals for the ninth circuit, decree of said circuit court of appeals, and the assignment of errors in this cause.

Done in the city of San Francisco, in the ninth circuit of the United States, this 14th day of August, 1897.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Order allowing appeal. Filed Aug. 11, 1897. F. D. Monckton, clerk.

390 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, complainants and appellants, *vs.* THE BELLINGHAM BAY BOOM COMPANY, a corporation, defendant and appellee.	In Equity. No. ——.

Petition.

Now come the United States of America, complainants and appellants, by Wm. H. Brinker, United States attorney for the district of Washington, who appears herein by the direction of the Attorney-General of the United States, and shows to the court that it is impracticable to copy

into the transcript on appeal herein complainants' Exhibits A, B, and E, and defendant's Exhibits 1, 2, 3, 4, and therefore prays the court that it order the clerk of this court to transmit the originals of said exhibits to the Supreme Court of the United States with the transcript of the record herein; and also prays the court to order the clerk of this court to transmit to the Supreme Court of the United States twenty copies of the printed record in this cause, as requested by the Attorney-General of the United States in his letter of July 31st, 1897, a copy of which is hereto attached.

WM. H. BRINKER,
United States Attorney for the District of Washington, appearing for Complainants and Appellants herein.

391 (Copy.)

S. G. 2064–1895.

DEPARTMENT OF JUSTICE,
Washington D. C., July 31, 1897.

WM. H. BRINKER, Esq.,
U. S. Attorney, Seattle, Washington.

SIR: Your letter of the 13th instant, reporting the decision of the circuit court of appeals for the ninth circuit in the case of the United States *vs.* The Bellingham Bay Boom Company, is received. I am clearly of opinion that the decision is erroneous; and you are therefore directed to take an appeal to the Supreme Court of the United States.

As requested, I return the record, opinion of the court, and briefs on both sides, which you enclosed with your letter. When you have prepared the appeal papers please send me the briefs for use in preparing the case in the Supreme Court.

The transcript of the record should be sent by the clerk to the Department for examination before it is filed in the Supreme Court, and with it he should send twenty copies of the record, which he advises me he has in his office.

Respectfully,

JOSEPH MCKENNA,
Attorney-General.

(Endorsed:) Petition to transmit orgl. exs. Filed Aug. 11, 1897. F. D. Monckton, clerk.

392 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANTS AND APPELLANTS, *vs.* THE BELLINGHAM BAY BOOM COMPANY, A CORPORATION, DEFENDANT AND APPELLEE. } In Equity. No. 308.

Order transmitting original exhibits.

Now, on this day, it appearing that it is impracticable to incorporate in the transcript upon appeal of this cause to the Supreme Court of the United States copies of the exhibits used upon the appeal of this cause:

It is therefore hereby ordered that the clerk of this court transmit all original exhibits to the said Supreme Court, there to be exhibited and

considered together with the transcript and record on appeal in this cause.

The exhibits hereinabove referred to being plaintiffs' Exhibits A, B, and E, and the defendant's Exhibits 1, 2, 3, 4.

WM. W. MORROW, *Judge.*

(Endorsed:) Order transmitting original exhibits. Filed Aug. 11, 1897. F. D. Monckton, clerk.

393 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, complainants and appellants, *vs.* THE BELLINGHAM BAY BOOM COMPANY, a corporation, defendant and appellee. } In Equity. No. 308.

Now come the complainants, by Wm. H. Brinker, United States attorney for the district of Washington, who appears for the said complainants and prosecutes an appeal herein by direction of the Attorney-General of the United States, the head of the Department of Justice of the Government of the United States, and present to the court and to the judges thereof their petition and notice praying an appeal from the decision and decree rendered against them in this cause to the Supreme Court of the United States, and file their assignment of errors in this cause; and the said petition for appeal and the notice thereof having been seen, heard, and examined, and having been fully considered by the undersigned judges of said court:

It is ordered that the prayer of said petition be, and the same is hereby, granted and an appeal allowed in said cause to the Supreme Court of the United States as prayed.

It is further ordered that the clerk of this court prepare and transmit to the clerk of the said Supreme Court, without delay, the record, pleadings, evidence, demurrer, all motions, statements of fact, opinion of the circuit court for the district of Washington, opinion of the circuit
394 court of appeals for the ninth circuit, decree of said circuit court of appeals, and the assignment of errors in this cause.

Done in the city of San Francisco, in the ninth circuit of the United States, this 14th day of August, 1897.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Order allowing appeal. Filed Aug. 11, 1897. F. D. Monckton, clerk.

395 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, complainants and appellants,
vs.
THE BELLINGHAM BAY BOOM COMPANY, a corporation, defendant and appellee.
In Equity. No. 308.

Order transmitting original exhibits.

Now, on this day, it appearing that it is impracticable to incorporate in the transcript upon appeal of this cause to the Supreme Court of the United States copies of the exhibits used upon the appeal of this cause:

It is therefore hereby ordered that the clerk of this court transmit all original exhibits to the said Supreme Court, there to be exhibited and considered, together with the transcript and record on appeal in this cause, the exhibits herein above referred to being plaintiffs' Exhibits A, B, and E, and the defendant's Exhibits 1, 2, 3, 4.

WM. W. MORROW, *Judge.*

(Endorsed:) Order transmitting original exhibits. Filed Aug. 11, 1897. F. D. Monckton, clerk.

396 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
v.
THE BELLINGHAM BAY BOOM COMPANY, APPELLEE.
No. 308.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing documents to be full, true, and correct copies of "Order transmitting original exhibits" and "Order allowing appeal," filed in the above-entitled cause, as the originals thereof remain of record in my office.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 14th day of August, A. D. 1897.

[SEAL.] F. D. MONCKTON, *Clerk.*

397 UNITED STATES OF AMERICA,
District of Washington, ss:

I hereby certify that I served the above order allowing appeal and the above order transmitting the original exhibits in the above cause upon the Bellingham Bay Boom Company, the defendant and appellee in said cause, by delivering to and leaving with E. M. Wilson, the president of said company, at the office of said company in the town of Fairhaven, Whatcom County, Washington, true and correct copies of said orders certified by the clerk of the above court, on the 19th day of August, 1897.

C. W. IDE,
United States Marshal for the District of Washington.
By J. H. MCLAUGHIN,
Deputy.

(Endorsed:) Certified copies of orders allowing appeal and transmitting original exhibits, with service thereon. Filed Aug. 24, 1897. F. D. Monckton, clerk.

398 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
v.
THE BELLINGHAM BAY BOOM COMPANY, APPELLEE. } No. 308.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing three hundred and ninety-seven (397) pages, numbered from one (1) to three hundred and ninety-seven (397), both inclusive, to be a true copy of the record and of the assignment of errors and of all proceedings in the above-entitled cause, including the opinion filed, as the originals thereof remain of record in my office, and that the same, together with plaintiffs' original Exhibits A, B, and E and defendant's original Exhibits 1, 2, 3, and 4, constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, California, this 27th day of August, A. D. 1897.

[SEAL.] F. D. MONCKTON, *Clerk.*

399 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, COMPLAINANTS AND APPELLANTS,
vs.
THE BELLINGHAM BAY BOOM COMPANY, A CHAPORATION, DEFENDANT AND APPELLEE. } In Equity. No.——

Citation.

By the Honorable , judges of the United States circuit court of appeals for the ninth circuit of the United States of America, to The Bellingham Bay Boom Company, a corporation, defendants and appellants, and to Thomas G. Newman, esq., its solicitor:

Whereas the United States of America have lately appealed to the Supreme Court of the United States of America from a decree lately rendered in the United States circuit court of appeals for the ninth circuit thereof, made in favor of you, the said Bellingham Bay Boom Company, a corporation, said defendant, said appeal having been directed to be taken by the head of the Department of Justice of the United States of America,

You are therefore hereby cited to appear before the Supreme Court of the United States, in the city of Washington, District of Columbia, within sixty days from this date, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of San Francisco, in the ninth circuit of the United States, this 14th day of August, in the year of our Lord one thousand eight hundred and ninety-seven.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA,
District of Washington, ss:

I hereby certify that I served the above citation upon The Bellingham Bay Boom Company, the defendant and appellee in the above cause, by delivering to and leaving with E. M. Wilson, president of said company, at the office of said company, in the town of Fairhaven, Whatcom County, Washington, a true and complete copy of said citation, on the 19th day of August, 1897.

C. W. IDE,
United States Marshal for the District of Washington.
By J. H. MCLAUGHIN,
Deputy.

(Indorsed:) No. 308. U. S. circuit court of appeals for the ninth circuit. United States of America, complainants and appellants, vs. The Bellingham Bay Boom Co., a corporation, defendant and appellee. Citation. Filed August 24, 1897. F. D. Monckton, clerk U. S. circuit court of appeals, ninth circuit.

(Indorsement on cover:) Case No. 16663. U. S. circuit court of appeals, 9th circuit. Term No., 450. The United States, appellant, vs. The Bellingham Bay Boom Company. Filed September 3d, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT,
v.
THE BELLINGHAM BAY BOOM COMPANY. } No. 161.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from the decision of the circuit court of appeals of the ninth circuit, affirming the decree of the circuit court refusing the United States an injunction, and dismissing its bill.

The original suit was brought by direction of the Attorney-General, upon the request of the Secretary of War, to enjoin the Bellingham Bay Boom Company from maintaining a boom in the Nooksack River, in the State of Washington, and for a decree requiring the removal of such obstruction. The Nooksack River is a navigable stream which rises in Skagit or Whatcom

County, Wash., and flows through the latter county, emptying into Bellingham Bay and forming, in connection with that bay, Hales Passage, the Straits of Juan de Fuca, and the Pacific Ocean, a continuous waterway from the head of navigation on the river between the State of Washington and the other States of the Union and foreign countries.

The obstruction complained of consists of a long boom at the point where the river flows into the bay, and was constructed by driving piles on each side of and across the channel of the river where the channel left the uplands and entered the tide flats of the bay, and by fastening to the piles long timbers called boom sticks, which extended from pile to pile so as to form a continuous and unbroken inclosure, sufficient to catch and retain within such inclosure all logs and floating driftwood which should be carried down the river.

THE BILL (Record, pp. 1 and 2).

The bill alleges that the defendant is a corporation organized under the laws of Washington. That the Nooksack River is a navigable stream which empties into Puget Sound, in Bellingham Bay, and that its waters are navigable from its mouth for several miles toward its source. That the defendant for more than one year has maintained and continues to maintain an obstruction in the navigable waters of the river, at and near where it empties into Bellingham Bay, the obstruction consisting of a boom at which logs floated down the river are moored, the boom being constructed in such manner as to blockade the river during a large portion

of the year, rendering navigation impossible. That the river is used for navigation by steamboats and small craft, and that the defendant has not obtained permission of the Secretary of War to continue or maintain the boom, and that the boom was constructed and is being maintained without his consent. The prayer is for a permanent injunction restraining the defendant from further continuing or maintaining the obstruction, and that the same be removed, and for general relief.

The bill was filed May 2, 1892. After a demurrer, which was overruled, the defendant filed its answer on July 23, 1894.

ANSWER (Record, pp. 9 to 14).

1. After a denial of averments not admitted, the answer admits:

2. Defendant's incorporation in June, 1890, giving the particulars, and averring that by virtue of its incorporation—

> Power and authority were given defendant in the waters of the Nooksack River, in the State of Washington, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of the defendant in catching, booming, sorting, rafting and holding logs, lumber, or other timber product, and to improve the said Nooksack River so as to facilitate the business of logging, driving, rafting, sorting, booming and holding logs, and protecting from loss those engaged in carrying on the same.

3. That the construction and maintenance of its boom was affirmatively authorized by the laws of Washington

in June, 1890, and under such authority the defendant, prior to September 19, 1890, constructed and maintained its boom for business purposes in strict accordance with the laws of Washington, and has continued to do so up to this time. The defendant has expended $50,000 in constructing and maintaining its boom.

4. That the Nooksack River is a small stream lying wholly within the State of Washington, emptying its waters into Bellingham Bay, and navigable for a few miles from its mouth by small light-draft water craft.

5. The defendant denies that its boom is constructed in such a manner as to blockade the river during a large portion of the year, but alleges that at certain periods, not to exceed twice a year, large quantities of brush, trees, and drift are, by freshets and excessively high water, carried down to the mouth of the river, where the same become lodged by reason of shoal water caused by widening of the river and the deploying of its waters into the bay. *The defendant during the past four years has expended $2,500 per year in improving the river by removing drift from its mouth and channel for 20 miles up.* The defendant alleges that by reason of the maintenance of its boom and the removal of the drift, the navigation of the river for boats and water craft has been greatly facilitated, and that in the absence of such improvement the mouth of the river would become entirely obstructed by drift.

6. Admits that it has not obtained permission of the Secretary of War to construct or maintain its boom, but alleges that at the time of construction there was no law commanding it to obtain such permission.

7. That immense forests of fir and cedar timber, of the market value of many millions of dollars, which constitute the chief wealth of Whatcom County, border on and are tributary to the Nooksack River and its branches, which is the natural and only outlet for most of this timber to the mills and market; that the commerce carried on upon the river by the transportation of goods, wares, and merchandise is and always has been trifling in amount, and in value greatly inferior to that of the logs and timber product floated out. The defendant is informed and believes that during the four years last past the total value of all goods so transported has not amounted to more than $5,000, while the value of the logs and timber floated down and rafted at defendant's boom during the same period amounts to $90,000.

8. That the chief value of the river is its use as an outlet for floating logs and timber; that the timber can not be floated out without the use of a boom located at the mouth of the river for catching, sorting, and rafting the same; that there are a number of sawmills located on the bay, which are largely dependent upon logs floated down the river.

9. The defendant alleges it has always maintained and operated the boom in accordance with the laws of Washington, and has exercised great care that it should not interfere with the navigation of the river by boats and water craft.

10. That Congress has never exercised legislative control or supervision over the waters of the river which in any manner controls or affects the location, maintenance, and operation of defendant's boom, and this court has no

jurisdiction to grant any relief in the premises, the only courts having jurisdiction being the courts of the State of Washington.

THE PROCEEDINGS.

The plaintiff demurred to paragraphs 2 to 10, inclusive, of the answer. (Rec., p. 15.) The demurrer was overruled on December 31, 1894 (Rec., p. 18), whereupon the plaintiff filed a general replication to the answer (Rec., p. 19). The issues being thus made up, the cause was referred to an examiner to take the proofs and report the same to the court. (Rec., p. 21.) The examiner, after being duly qualified, took the testimony (Rec., pp. 22 to 329) and reported it to the court. The cause was submitted upon this testimony, and the circuit court, on February 20, 1896, found in favor of the defendant and dismissed the bill. (See opinion, Judge Hanford, Rec., p. 332.) The United States appealed, and the circuit court of appeals for the Ninth circuit, Judges Gilbert, Ross, and Hawley, on June 28, 1897, affirmed the judgment of the circuit court. (See opinion, Hawley, J., Rec., p. 369.) From this decision an appeal was taken to this court.

The facts and findings of the circuit court, substantially adopted by the circuit court of appeals, appear in the opinion of Judge Hanford. (Rec., p. 337.)

OPINION OF JUDGE HANFORD.

> The evidence has been taken before an examiner, and reported to the court. At the time of introducing proofs *it was stipulated between the parties*

that the Nooksack River is a navigable stream, having its source in Whatcom County, and running through Whatcom County to Bellingham Bay, emptying its waters into said bay, and is navigable from its mouth for a distance toward its source by light water craft, and said river is wholly within said county.

On the part of the Government *nineteen witnesses* were called and sworn; two steamboat captains who have had practical experience in navigating the Nooksack River with small steamboats, one merchant, one proprietor of a sawmill, one fisherman, one schoolteacher, and a number of farmers and county officials. They all appear to have a general knowledge of the country through which the river flows, and the history of the settlement of the Nooksack Valley. The testimony of said witnesses being in general to the effect that *the piles driven to support the defendant's boom, and the boom itself, impedes the passage of steamboats*, and that it has a tendency to collect drift timber and cause shoaling at the mouth of the river by detaining the silt and sand, and causing the same to form a bar, and that navigation of the river by boats is interfered with by the bar and by jams of drift collecting therein, and by filling up of the channel.

For the defendant *nine witnesses* were sworn and have testified, including steamboat men, engineers, and the persons who superintended the work done by the defendant in constructing the boom and clearing the river of jams and obstructions, and their testimony tends to prove the allegations of the defendant's answer as to the particular time when the boom was constructed, the condition of the river prior thereto, *and the particular work and expenditures of the defendant in clearing the river of jams and*

keeping it open for navigation. As to these disputed facts the defendant's witnesses, having particular knowledge, are better able to testify intelligently, by reason of having made examinations and surveys, or being connected with the work done, than the witnesses for the Government, who speak only from a general knowledge. No engineer has been called by the Government to testify as to facts ascertained by an actual survey.

Upon consideration of all the evidence, I find that prior to the construction of the boom, trees and drift carried down the river by floods formed jams which obstructed navigation, requiring labor and expense to keep the river open, and that the boom company have, since commencing to construct the boom, at an expense of many thousand dollars, cut out, blasted, and removed all drift which prior to the commencement of this suit lodged in the vicinity of the boom and kept the mouth of the river *clear of obstruction other than the boom itself, and the saw logs collected therein, and by such expenditures and work the company has rendered ample recompense for the impediment to navigation of the river by vessels caused by its boom.*

The boom was constructed in the summer of 1890 and completed prior to the 19th day of September, 1890, the date of approval of the act of Congress pursuant to which this suit was instituted; and the construction of the boom was duly authorized, as alleged in the answer, by an act of the legislature of the State of Washington, approved March 17, 1890, which act authorizes the incorporation of boom companies, and section 3 provides: "Such corporations shall have power, and are hereby authorized, in any of the waters of this State, or the dividing waters thereof, to construct, maintain, and use all

necessary sheer or receiving booms, dolphins, piers, piles, or other structures necessary or convenient for carrying on the business of such corporations." (Laws of Washington, 1889–90, 470.)

By uncontradicted evidence it is shown that there are immense forests of timber which, when cut into saw logs, can be brought to market in the most convenient way by floating down the Nooksack River, the value of which is many times greater than the probable value of other products which may be transported upon the river, and to make the river available as a means for bringing timber to market it is necessary to maintain a boom at its mouth.

In view of all the facts, and considering that this river is wholly within the State, I hold, first, that the legislature of the State had ample power prior to the enactment by Congress of the river and harbor act of September 19, 1890, to authorize the construction of this boom, and that at the time of its construction it was authorized by law, and therefore not a nuisance nor an unlawful obstruction of navigation; and, in the second place, that the chief value of the Nooksack River as a highway is for the floating of saw logs, and that persons and corporations having occasion to use it for that purpose have rights equal to the rights of others to use the river as a highway for boats and vessels, and that a boom at the mouth of the river necessary for gathering and holding saw logs is to be regarded as an aid to the use of the river for a lawful purpose, and entitled to protection the same as a wharf or pier constructed at a convenient place for the convenience of vessels.

Observe what Judge Hanford concedes and what he concludes. He says the Government introduced *nineteen witnesses* who testified "that the piles driven to support

the defendant's boom, and the boom itself, impede the passage of small boats, and that it has a tendency to collect drift, etc., at the mouth of the river." On the other hand, the defendant introduced *nine witnesses* who testified when the boom was constructed, the condition of the river prior thereto, "and the particular work and expenditures of the company in clearing the river of jams and keeping it open for navigation." After considering this testimony the judge finds that prior to the construction of the boom the drift carried down the river by floods formed jams which obstructed navigation, requiring labor and expense to keep the river open, and that—

> The boom company have, since commencing to construct the boom, at an expense of many thousand dollars, cut out, blasted, and removed all drift which prior to the commencement of this suit lodged in the vicinity of the boom and kept the mouth of the river *clear of obstructions other than the boom itself, and the saw logs collected therein, and by such expenditures and work the company has rendered ample recompense for the impediment to navigation of the river by vessels caused by its boom.*

To say that the boom company has removed the drift and kept the mouth of the river "clear of obstructions, other than the boom itself and the saw logs collected therein," is to admit that the boom with the saw logs it collects is an obstruction.

To say that the company has rendered ample recompense for the impediment to the navigation of the river by vessels caused by its boom, is to concede that the boom is an impediment to navigation.

Here is a virtual finding that the nineteen witnesses for the Government have proved that the boom is an obstruction to navigation, but that the nine witnesses for the defendant have shown that the company has expended a large amount of money in clearing the river of drift and keeping it clear of obstructions other than the boom itself and the saw logs collected by it. And in view of this expenditure, the court finds that the public is amply recompensed for the impediment to navigation caused by the boom. In other words, the court holds that if the owner of a boom which blockades a river, and impounds it for his own benefit, expends money in clearing the river of drift, such expenditure legalizes the obstruction to navigation. This is strange doctrine. The owner of the boom cleared away the drift voluntarily and for his own benefit. He can not be compelled, even if allowed to maintain his boom, to continue such expenditures. He only did what the Government ought to do and is ready to do. All this testimony as to the expenditures made by the company in clearing away the jams and drift was outside the case.

The ultimate findings were:

1. The boom was authorized by the law of Washington, and therefore not an unlawful obstruction.

2. The chief value of the river is for floating logs, and those interested in using it for that purpose are as much entitled to have a boom for their convenience as owners of vessels are entitled to have a wharf or pier for theirs.

Respecting the second finding, it may be observed that there is a difference between a wharf and a boom like

this. A wharf helps those who run vessels and does not hurt those who run saw logs. A boom like this may help the lumbermen, but it ruins the steamboat men. Neither class should be allowed to appropriate the river to the exclusion of the other. The river should be so regulated as to be free to all.

Respecting the first finding, that the boom was a lawful obstruction because authorized by the law of Washington, I shall have something to say later. I may remark now that the circuit court of appeals, affirming this finding, held that it could not and would not inquire whether the boom had been constructed in accordance with the laws of Washington, and therefore was authorized by the laws of Washington. If there was a State law, and a boom claimed to have been built under it, then the question whether the boom was really built under the law or in violation of it was for the State courts to determine.

THE FACTS ESTABLISHED.

I submit that the following facts are established by the evidence:

The Nooksack River rises in either Skagit or Whatcom County, Wash., flows through Whatcom County into that portion of Puget Sound known as Bellingham Bay, and, in connection with that Bay, Hales Passage, the Straits of Juan de Fuca, and the Pacific Ocean, forms a continuous waterway from the head of navigation on the river to the several States of the Union and foreign countries.

The river is navigable from its mouth for from 20 to 30 miles toward its source for steamboats of from 2 to 5 and sometimes 7 feet draft and from 10 to 100 tons burden. This river has been so navigable, and has been navigated by vessels of the draft and tonnage mentioned, since the earliest settlements in that country, without serious impediment, until the building of defendant's boom in the year 1890. The country adjacent to the river is heavily timbered, and at times of heavy rains the waters come down the river in such volume as to form freshets, which wash into the river and carry down with the current large quantities of trees and driftwood, but with the exception of a small jam or two formed up the river some distance from its mouth, and which were removed by the settlers and steamboat men, this floating drift never created any obstruction to the navigation of the river. The drift thus floated down the river was carried out into the bay and thence to sea, and never at any time lodged in the channel at the mouth of the river, so as to obstruct navigation, until after the building of defendant's boom across the channel.

The boom of defendant consists of large piles driven in the tide lands on each side of the channel of the river, commencing near where that channel leaves the uplands and flows across the tide lands toward the waters of the bay, and parallels that channel on each side, toward the bay, until it reaches a point near the line of low water of the bay, when the line of piles crosses the channel and joins the line of piles on the other side, forming a "pocket," *thus completely inclosing the channel of the river*

from the uplands outward toward the bay for a distance of more than a half mile. To enable steamboats and other craft to navigate the river, and to facilitate the rafting of saw logs to market, a "trip" or opening was left at the point where the piling of the boom crossed the channel at the lower end. This "trip" was closed by two "boom sticks" bolted together and fastened, one end to a pile on one side of the channel, and, when there was no drift to prevent it, was opened for the passage of boats. *No passageway for boats is left between the boom and the opposite shore.*

The boom thus constructed inclosed the channel of the river below the uplands in a *cul de sac*, into which saw logs and driftwood floated, and were held and retained. In times of freshets these logs and drift came down in such quantities as to be beyond the power of defendant to control, and completely filled the boom and formed a "jam" nearly a half mile long and of such vast proportions as to completely fill up the channel and obstruct and prevent the passage of boats. This jam has rendered the "trip" useless; and whenever a boat has attempted to enter the mouth of the river it has been compelled to go up, outside, and to the east of the boom, across the tide flats *at high tide*, and enter the boom at a point above the drift, made by the defendant for the purpose. Many times when boats attempted to enter the river this way they became grounded on the flats and were caused great delay.

At the time of the survey for, and the construction of, the boom, the channel of the river was open and free from driftwood from the uplands to the deep water of

the bay. Prior to the building of the boom a considerable traffic by steamboats was carried on this river between the towns and settlements along the river and the cities of Whatcom, Seattle, and Tacoma. During this time boats made frequent trips up and down the river, carrying in merchandise and carrying out farm products. As many as two steamboats per day have been seen on the river during that time. But since the erection of the boom this traffic has wholly ceased.

The settlements along this river have been constantly increasing, and the farm products also greatly increasing, and the demand for steamboat transportation growing from year to year. The obstruction to navigation caused by this boom has caused, and is continuing to cause, irreparable injury to the settlers in the country adjacent to that river.

That as settlements and population increase, the necessity for river transportation will increase in the same ratio, and, by the same token, as the clearing of the land progresses the necessity for a log boom will decrease.

THE STATUTES.

Authority to construct the boom is claimed under section 3 of an act of the statutes of Washington, entitled "An act to declare and regulate the powers, rights, and duties of corporations organized to build booms and to catch logs and timber products therein," which provides:

> Such corporations shall have the power and are hereby authorized, in any of the waters of this State, or the dividing waters thereof, to construct, maintain, and use all necessary sheer or receiving booms,

> dolphins, piers, piles, or other structure necessary or convenient for carrying on the business of such corporations: *Provided, That such boom or booms, sheer booms, or receiving booms shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels, or steam crafts of any kind whatsoever, or for ordinary purposes of navigation* (1 Hill An. Stat. Wash., sec. 1592.)

Authority to compel the removal of the boom is claimed under section 10 of the river and harbor act of September 19, 1890 (26 Stat., 465), which reads as follows:

> That the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. * * * The creation or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

ARGUMENT.

I.

The boom which the Government seeks to have removed is constructed at the mouth of the Nooksack River, where it empties into Bellingham Bay. Any

improvement of the river for purposes of navigation would be an improvement above this obstruction. The existence of the boom is therefore inconsistent with the improvement of the river as a navigable stream. If Congress made appropriations for the improvement of this river prior to the construction of the boom, I submit it shows that Congress assumed jurisdiction and exercised control over the river in such a way as to take it out of the power of the State to authorize the construction of a boom across its mouth.

Congress has assumed jurisdiction and exercised control over the Nooksack River since 1884 by making appropriations for its improvement, as follows:

On July 5, 1884 (23 Stat., 144):

> Improving the Skagit, Stillaguamish, *Nootsack* Snohomish and Snoqualmie rivers, Washington Territory: Continuing improvements, ten thousand dollars.

On August 5, 1886 (24 Stat., 327):

> Improving Skagit, Steilaquamish, *Nootsack*, Snohomish, and Snoqualmie rivers, Washington Territory: Continuing improvement, ten thousand dollars.

On July 31, 1888 (25 Stat., 423):

> Improving Skagit, Stielaquamish, *Nootsack*, Snohomish and Snoqualmie rivers, Washington Territory: Continuing improvement, fifteen thousand dollars; of which five thousand dollars shall be used for a snag boat and outfit.

On September 19, 1890 (26 Stat., 452):

> Improving Shagit, Stielaquamish, *Nootsack*, Snohomish, and Snowqualme rivers, Washington: Continuing improvement, twelve thousand dollars.

On September 19, 1890 (26 Stat., 456, 464):

SEC. 17. That the Secretary of War is hereby directed, at his discretion, to cause examinations or surveys, or both, to be made, and the estimated cost of improvement to be estimated, at the following localities, to wit: * * *

Washington.

Nooksack River, Skagit, Snohomish, D'Wamish, Black, Puyallup, Nasel, North, Gray's, Deep, Skamakawa, and Crooked rivers.

On July 13, 1892 (27 Stat., 111, 115):

SEC. 6. That the Secretary of War is hereby directed to cause preliminary examinations to be made at the following localities, to wit: * * *

Washington.

Nooksack River, with a view of removing obstructions, straightening channel to prevent jams and the filling of Bellingham Bay with deposits of earth.

On August 7, 1894 (28 Stat., 369, 371):

SEC. 12. That the Secretary of War is hereby directed, at his discretion, to cause surveys to be made and the cost of improvement to be estimated at the following localities, to wit:

Washington.

* * * *Nootsack River.* * * *

On June 3, 1896 (29 Stat., 234):

Improving Puget Sound and its tributary waters, Washington: Continuing improvement, including

> the rivers Skagit, *Nooksak*, Duwamish, and Puyallup, seventy-five thousand dollars, of which sum so much thereof as may be necessary may be used for the rebuilding of a snag boat.

On July 29, 1886 (24 Stat., 160), Congress authorized the Bellingham Bay Railway and Navigation Company *to construct bridges over the Nooksack* and other rivers. The plans for such bridges to be first submitted to and approved by the Secretary of War, he to fix the rates of toll to be charged. *The bridges to contain draws, so as not to hinder or impair the free navigation of the streams.* Congress reserved the right to require changes to be made in the bridges at the cost of the owners, or to require the entire removal thereof, *in order to preserve the free navigation of the rivers.* The act concludes with this proviso:

> *Provided*, That nothing in this act shall be so construed as to repeal or modify any of the provisions of law now existing in reference to the protection of the navigation of rivers, or to exempt said bridges from the operation of the same.

I am aware that, in *Willamette Iron Bridge Co.* v. *Hatch* (125 U. S., 1), it was held that the making of appropriations for improving the Willamette River did not amount to an assumption by Congress of police power over it. But a careful examination of that case shows that the decision was based upon the fact that there was no statute of the United States authorizing the bringing of an injunction suit to require the removal of an obstruction in navigable waters within a State. In the present case, as we shall show, there is an express statute authorizing the suit brought.

In *Wisconsin* v. *Duluth* (96 U. S., 379), the action of Congress in appropriating money for and exercising supervision over the improvement of the harbor at Duluth was deemed by this court sufficient to warrant the conclusion (p. 386) that Congress had adopted the canal and harbor improvement originally started by the city of Duluth. The court therefore refused to enjoin the harbor improvement, holding that the work being done was by Congress, under its authority to regulate commerce among the several States.

II.

The boom under consideration was built in tide waters, at the mouth of this river. Before considering the authority of the States, in the absence of legislation by Congress, to authorize obstructions in navigable streams, it may be well to refer to the underlying inalienable interest of the public in all navigable waters.

In the case of the *Illinois Central Railroad* v. *Illinois* (146 U. S., 387), it was held that an act of Illinois granting the railroad company certain submerged lands in the harbor of Chicago, adjacent to its property, was inoperative and void, because in disregard of a public trust. The court held that the State was powerless to deprive the public of the interest it had in these valuable waters. Here are pertinent extracts from the opinion of the court, delivered by Mr. Justice Field:

Page 435:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands

covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. (*Pollard's Lessee* v. *Hagan*, 3 How., 212; *Weber* v. *Harbor Commissioners*, 18 Wall., 57.)

Page 452:

It [the title held by the State of Illinois] is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title *held in trust for the people of the State that they may enjoy the navigation of the waters*, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged

cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. *Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.* The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and water remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.

Page 458:

In *People* v. *New York and Staten Island Ferry Co.* (68 N. Y., 71, 76), the court of appeals of New York said:

The title to lands under tide waters within the realm of England, were, by the common law, deemed to be vested in the King as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The King, by virtue of his proprietary interest could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, *and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void.* In his treatise De Jure, Maris (p. 22), Lord Hale says: "The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use;" and Mr. Justice Best, in *Blundell* v. *Catterall* (5 B. & A., 268), in speaking of the subject, says: "The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil."

The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. *The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce*, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it.

The boom as constructed is an obstruction to the common right in the navigation of this river. It has practically destroyed its navigation by boats. It has served not only to impede and obstruct navigation, but as a virtual exclusive appropriation of the navigable waters at the mouth of the river and the submerged land under and above the boom. If the State of Washington attempted to authorize the construction of such a boom, its action was violative of a public trust and void.

III.

While I deny the right of a State to give away a navigable river to a private corporation, I concede that until Congress assumes control of navigable waters within a State the State may by appropriate legislation regulate the use of such waters. But such power of the State is always subject to the paramount authority of Congress when it sees fit to take control.

I deny that a State may legally permit a private company to dam a navigable river and use it for an ice pond, but I admit that it may authorize the construction of bridges, piers, wharves, booms, and other aids to navigation pending legislation by Congress indicating an intention to assume jurisdiction over the waters. But this power in the State is always subject to the limitation that Congress may interpose at any time, may regulate all obstructions, fix the conditions upon which they may be created or maintained, and determine what shall be removed and how.

I have taken pains to read carefully the cases cited by opposing counsel in support of the power of the State to

authorize this boom, and this court, when upholding the power of the State in the absence of action by Congress, has been careful to reserve and emphasize the supreme and paramount power of the United States whenever Congress shall see fit to interpose, as it has done by the act of September 19, 1890.

In the great case of *Gibbons* v. *Ogden* (9 Wheat., 1), argued by Mr. Webster and others, in which the opinion was delivered by Mr. Chief Justice Marshall, it was held that certain acts of New York granting to Livingston and Fulton the exclusive right to navigate the waters within the jurisdiction of that State with steamboats for a term of years were repugnant to the clause of the Constitution which authorizes Congress to regulate commerce among the several States and with foreign nations.

Mr. Chief Justice Marshall thus defines the power vested in Congress to regulate commerce (p. 196):

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

Again, page 197:

> The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes."

Is the right claimed as granted in the case at bar,—a right to build a boom across a navigable river at its

mouth and thus monopolize the stream for logging purposes, any less exclusive than that involved in *Gibbons* v. *Ogden?*

The case of *Wilson* v. *Black Bird Creek Marsh Co.* (2 Peters, 245) grew out of the construction of a dam across a navigable creek emptying into the Delaware River. The dam was built by authority of a law of Delaware, for the purpose of reclaiming certain marsh lands. Wilson and others were the owners of the sloop *Sallie*, and, to get into the creek, attempted to destroy the dam. The Supreme Court affirmed a judgment for damages in favor of the dam owners. This was on the ground that the construction of the dam for the purpose of reclaiming the marsh, and thus improving the health of the inhabitants of the locality, was within the police power of the State, and Congress had passed no act indicating an intention to protect the navigation of the Black Bird Creek. Mr. Chief Justice Marshall says (bottom p. 250):

> *If Congress had passed any act which bore upon the case;* any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States; *we should not feel much difficulty in saying that a State law coming in conflict with such act would be void.* But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

In the case of *Pennsylvania* v. *Wheeling Bridge Company* (13 Howard, 518) (known as the Wheeling Bridge Case), this court, at the instance of the State of Pennsylvania, held that a bridge being constructed over the Ohio River at Wheeling was a nuisance, and ordered its alteration or removal. This was done because the Ohio River, by the ordinance organizing the Northwest Territory, and by the action of Congress sanctioning the compact between Virginia and Kentucky, had been recognized by the United States as a navigable stream, the use of which was to be kept free and open to all the people. Mr. Justice McLean, speaking for the court, said, page 566:

> No State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance.

It was urged in this case that while the bridge might, to some extent, obstruct navigation, yet it subserved the demands of commerce by furnishing a highway across the river, and that the advantages the bridge furnished overbalanced the injuries it did. Upon this point the court said, page 577:

> It is said that the interest of commerce requires navigable waters to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route is not

greater than the injury done. In the case of the *King* v. *Sir John Morris* (1 Barn. & Adol., 441) it was held, that the injury can not be balanced against the benefits secured. And in the case of the *King* v. *George Henry Ward* (4 Ad. & El., 384) it was held, where the jury found that an embankment complained of was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, it amounted to a verdict of guilty.

Subsequently Congress passed an act declaring the Wheeling Bridge, as it stood, to be a lawful structure, so the mandate of the court was never executed, the court, in the next decision in this case (18 How., 421), holding that the power of Congress being absolute in the premises, the authority of the bridge company to maintain the bridge existed from the moment of the passage of the act declaring the bridge a lawful structure.

The case of *Gilman* v. *Philadelphia* (3 Wall., 713) grew out of the construction by the city of Philadelphia of a bridge over the Schuylkill River at Chestnut street. Gilman owned a wharf on the Schuylkill above Chestnut street. It was conceded that the bridge would prevent vessels reaching his wharf. The bridge was constructed under authority of a law of Pennsylvania. It was insisted that this law was void, because it authorized an obstruction of a navigable stream, recognized as such by acts of Congress. The court held, however, that there was no act of Congress applicable to the Schuylkill River at this point. In the absence of legislation by Congress regulating the construction of bridges across this stream, the legislature of Pennsylvania had power to act. The

court was very careful, however, to reserve the supreme and absolute power of Congress over the subject, in case it should see fit to legislate, saying by Mr. Justice Swayne (bottom p. 731):

> *Lastly, Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them.* Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary.

Mr. Justice Clifford, with whom concurred Mr. Justice Swayne and Mr. Justice Davis, dissented, on the ground that, for reasons stated in the dissenting opinion (p. 732), Congress had regulated the navigation of the Schuylkill River, and that the State law authorizing the construction of the bridge and the obstruction of the stream was void.

Pound v. *Turck* (95 U. S., 459) grew out of a suit brought by Turck and others against Pound and others. The latter had constructed a boom in the Chippewa River, Wisconsin, which obstructed the stream and damaged a raft of lumber belonging to the former. The owners of the boom defended on the ground that they had constructed it under authority of an act of the legislature of Wisconsin. Mr. Justice Miller delivered the opinion of the court. He conceded that the Chippewa River was a navigable stream lying wholly within the State of Wisconsin, and that the boom operated as an obstruction to navigation. After commenting upon the

Black Bird Creek Case and the case of *Gilman* v. *Philadelphia*, he says (p. 464):

> The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so as to rafts and barges. But to the legislature of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. *And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so*, the exercise of this limited power may all the more safely be confided to the local legislatures.

It will be observed that this case, like the *Black Bird Creek Case* and *Gilman* v. *Philadelphia*, turns on the fact that Congress had not exercised with respect to this particular stream its right to regulate commerce among the several States. In each of these three cases the court was careful to say that whenever Congress should see fit to interfere in order to protect the public rights in the stream then its authority would become paramount, and

whatever had been done under State legislation might be wiped out. It was for this very reason, because of the reserved power in Congress, that the right of the State to legislate in the interim was sustained.

South Carolina v. *Georgia* (93 U. S., 4) was an original bill in this court, filed by the State of South Carolina to enjoin the State of Georgia and the Secretary of War from carrying out an improvement of the Savannah River, which closed one of its several channels, to the alleged injury of South Carolina and its citizens. The plaintiff relied largely upon the compact between South Carolina and Georgia, made in 1787, by which it was agreed that the boundary between the two States should be the northern branch of the Savannah River and that the navigation of the river along a specified channel should be forever free. The court attached no importance to the compact because, after it was made, both States became members of the United States, and joined in delegating to Congress the right to regulate commerce with foreign nations and among the several States. The court expressly adopts the language of *Gilman* v. *Philadelphia*, where the court held that the power to regulate commerce includes the power to keep the navigable rivers "*open and free from any obstructions to their navigation interposed by the States, or otherwise; to remove such obstructions where they exist;* and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of the offenders" (p. 10).

Respecting the contention that Congress could not place an obstruction in a navigable stream, for any pur-

pose, the court, speaking by Mr. Justice Strong, said, bottom page 11:

> It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of a stream. It may construct jetties. *It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.* If, as we have said, the United States have succeeded to the power and rights of the several States, so far as control over interstate and foreign commerce is concerned, this is not to be doubted.

There can be no doubt, therefore, of the authority of Congress to cause the removal of this boom in the Nooksack River, although it was constructed by express authority of the State of Washington.

The case of *Wisconsin* v. *Duluth* (96 U. S., 379) was an original action brought in this court by the State of Wisconsin against the city of Duluth to enjoin a harbor improvement then being made under authority of Congress, which it was claimed changed the natural outlet into Lake Superior in the neighborhood of Superior City and Duluth, and injured the State of Wisconsin and its citizens. Mr. Justice Miller delivered the opinion of the court. After describing the character of the improvement and the action of Congress in appropriating money for and exercising supervision over the improvement at Duluth, he reaches the conclusion (p. 386) that Congress had adopted the canal and harbor improvement

originally started by the city of Duluth and that the work so to be enjoined was being done by Congress itself. Then he says (p. 387):

> While this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the General Government in the same matter, the doctrine has been laid down with unvarying uniformity, *that when Congress has, by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority.* The adjudged cases in this court on this point are numerous.

The Bridge Company v. *United States* (105 U. S., 470) was a suit brought by the Newport and Cincinnati Bridge Company against the United States to recover the cost of altering the bridge in accordance with an act of Congress. Congress by a resolution gave its assent to the erection of this bridge across the Ohio, but expressly reserved "the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under the authority of this resolution, or to direct the necessary modifications and alterations of said bridge." The court, Justices Miller, Field, and Bradley dissenting, held that, under the circumstances, the company erected the bridge at its own risk. Whether, under the resolution, the bridge became a material obstruction to navigation was for Congress to determine. Mr. Chief Justice Waite, speaking for the court, said, page 475:

> The paramount power of regulating bridges that affect the navigation of navigable waters of the

> United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States [citing cases].

Again, page 479:

> But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. *The action of Congress is supreme, and overrides all that the States may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. Those who act under State authority alone necessarily assume all the risks of legitimate Congressional interference.*

Again (p. 480):

> Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.

Mr. Justice Miller in his dissenting opinion conceded the authority of Congress to require the alterations in the bridge, but took the view that because of the wording of the act providing for the alterations Congress intended to waive certain rights of the United States and refer the matter to the court for the purpose of making compensation for the required changes.

Mr. Justice Field placed his dissent upon the broad ground that Congress had no authority to compel the alteration or removal of this bridge, seeing it was not shown to be a material obstruction to navigation. He says (p. 500):

> Under this act the present bill was filed, and it was clearly shown at the hearing that when the act was passed the bridge had been constructed substantially in compliance with all the provisions of law in relation thereto; that so far as constructed it did not materially obstruct the navigation of the river, and would not have done so had it been completed according to the original plan. Yet the court below held, and this court sustains its ruling, that for the enormous expenditures forced upon the company the United States are in no way responsible. *This court thus, in effect, decides that the power of Congress over all structures crossing navigable streams is absolute; and that it can change or remove them at its pleasure, without regard to their effect upon the free navigation of the streams, and without compensation to the owners.*

Mr. Justice Bradley dissented, for the reason that the bridge was a lawful structure, the property of the bridge company, and that Congress could not constitutionally require its demolition or reconstruction without providing for compensation to the owners. Respecting the proviso in the original resolution of the right of Congress to withhold its assent in case the free navigation of the river should be materially obstructed and to direct any necessary alterations, he says, page 508:

> The power thus reserved was merely declaratory of the power which Congress would have had with-

> out reserving it; but there is no stipulation or condition that it might be exercised without providing for compensation to the proprietors of the bridge; and inasmuch as the bridge became a lawful structure—was, in fact, expressly declared such by the resolution of 1869—it can not be presumed that this reserved power was to be exercised in any other than the constitutional mode.

In *Cardwell* v. *American Bridge Co.* (113 U. S., 205) the authority of California to authorize the construction of a bridge over a navigable stream wholly within its limits was sustained, notwithstanding the bridge wholly obstructed the navigation of the stream. The original case was one in equity for the removal of the bridge. The river involved was a branch of the Sacramento; it was wholly within the State of California. After citing *Wilson* v. *Black Bird Creek Marsh Co.*, *Gilman* v. *Philadelphia*, *Pound* v. *Turck*, and other similar cases, the court, speaking by Mr. Justice Field, says (p. 208):

> They recognize the full power of the States to regulate within their limits matters of internal police, which embraces, among other things, the construction, repair and maintenance of roads and bridges, and the establishment of ferries; * * * and that, as to bridges over navigable streams, their power is subordinate to that of Congress, as an act of the latter body is, by the Constitution, made the supreme law of the land; but that until Congress acts on the subject their power is plenary. *When Congress acts directly with reference to the bridges authorized by the State, its will must control so far as may be necessary to secure the free navigation of the streams.*

The Willamette Bridge Co. v. *Hatch* (125 U. S., 1) was originally an injunction suit, brought by a wharf owner in Portland, to restrain the construction of a bridge across the Willamette River, which he claimed obstructed navigation and interfered with the access of vessels to his wharf. The bridge was being built under authority of a law of Oregon. This court found in favor of the bridge company and dismissed the suit, saying, by Mr. Justice Bradley, page 8:

> There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offenses against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; *but they are not offenses against the United States laws which do not exist;* and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different States the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Wilson* v. *Black Bird Creek Co.*, 2 Pet., 245; *Pollard's Lessee* v. *Hagan*, 3 How., 212, 229; *Passaic Bridges*, 3 Wall., 782, App.; *Gilman* v. *Philadelphia*, 3 Wall., 713, 724; *Pound* v. *Turck*, 95 U. S., 459; *Escanaba Co.* v. *Chicago*, 107 U. S., 678; *Cardwell* v. *American Bridge Company*, 113 U. S., 205; *Hamilton* v. *Vicksburg, &c., Railroad Co.*, 119 U. S., 280; *Huse* v. *Glover*, 119 U. S., 543;

Sands v. *Manistee River Imp. Co.*, 123 U. S., 288; *Transportation Co.* v. *Parkersburg*, 107 U. S., 691, 700. The usual case, of course, is that *in which the acts complained of are clearly supported by a State statute; but that really makes no difference.* Whether they are conformable or not conformable to the State law relied on is a State question, not a Federal one. *The failure of State functionaries to prosecute for breaches of the State law does not confer power upon United States functionaries to prosecute under a United States law when there is no such law in existence.*

It will be observed that the court based its conclusions upon the absence of any United States statute authorizing a suit to restrain or abate an obstruction in navigable waters. It says it makes no difference whether the obstruction complained of is or is not authorized by a State law. In either event the United States courts have no jurisdiction. Of course this language does not apply where there is a statute, like that before the court, expressly authorizing injunction suits to restrain and abate unlawful obstructions in navigable waters.

After referring to a number of cases in which the authority of the States to authorize obstructions to navigation was upheld because of the absence of any Congressional legislation on the subject, the following language is used which sustains to the fullest extent the absolute power of Congress in the premises when it sees fit to act (and it has acted in the case before the court), bottom page 12:

> We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only

say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet, *when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose.* It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams.

Monongahela Navigation Co. v. *United States* (148 U. S., 312) grew out of the condemnation by the United States, under an act of Congress, of a lock and dam on the Monongahela River belonging to this navigation company. This lock and dam had been constructed by authority of an act of the legislature of Pennsylvania, empowering the navigation company to collect tolls. The lower courts held that in ascertaining the compensation to be paid by the United States, the franchise of taking tolls was not to be considered. The Supreme Court reversed this judgment, holding that the value of the lock and dam was due to its use—to the right annexed of exacting tolls. Mr. Justice Brewer, who delivered the opinion of the court, comments on the cases of *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 245; *Pound* v. *Turck*, 95 U. S., 459; *Huse* v. *Glover*, 119 U. S., 543; *Sands* v. *Manistee River Improvement Co.*, 123 U. S., 288; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S., 1; and

Bridge Co. v. *United States*, 105 U. S., 470, and says, page 336:

> It can not be doubted, in view of the long list of authorities,—for many more might be cited,—that Congress has the power, in its discretion, to compel the removal of this lock and dam as obstructions to the navigation of the river, or to condemn and take them for the purpose of promoting its navigability. In other words, it is within the competency of Congress to make such provision respecting the improvement of the Monongahela River as in its judgment the public interests demand. *Its dominion is supreme.*

In *Shively* v. *Bowlby* (152 U. S., 1, 58), this court had to deal with a conflict as to the title of certain lands below high-water mark in the Columbia River, in the State of Oregon, between parties claiming, respectively, under the United States and under the State of Oregon. The entire subject was thoroughly examined, including a review of all the cases, both State and Federal, and one of the conclusions reached was thus stated by Mr. Justice Gray, page 58:

> Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution in the United States.

In *Eldridge* v. *Trezevant* (160 U. S., 452), the doctrine existing in the State of Louisiana that lands abutting on

the rivers and bayous were subject to the servitude in favor of the public, whereby such portions thereof as were necessary for the purpose of making and repairing public levies might be taken, in pursuance of law, without compensation, was fully recognized as enforceable, notwithstanding the fourteenth amendment.

In *Gibson* v. *United States* (166 U. S., 269), it was held that the owner of a farm on an island in the Ohio River had no valid claim against the United States for injuries resulting from the construction of a dike in the river which destroyed the landing of the claimant and prevented free egress and ingress to her farm from the river. Mr. Chief Justice Fuller, speaking for the court, said, bottom page 271:

> All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various States and individual owners under them, it is always subject to the servitude in respect to navigation created in favor of the Federal Government by the Constitution. (*South Carolina* v. *Georgia*, 93 U. S. 4; *Shively* v. *Bowlby*, 152 U. S., 1; *Eldridge* v. *Trezevant*, 160 U. S., 452.)

Again, page 276:

> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

IV.

If Congress, by making appropriations for the improvement of the Nooksack River and by passing the act of July 29, 1886 (24 Stats., 160), authorizing the construction of bridges over this river under certain conditions, did not show an intention to assume and exercise its authority over the stream, so as to preserve it from obstructions and keep it free for navigation, then I submit that by the passage of the river and harbor act of September 19, 1890 (26 Stats., 453), Congress, by enacting sections four to ten, inclusive, assumed control of this river along with other navigable waters of the United States. This act was passed for the express purpose of placing all the navigable waters of the United States under the control of the General Government. For the convenience of the court I print these sections as an appendix.

Sections 4 and 5 of this act (amending sections 9 and 10 of the act of August 11, 1888) give the Secretary of War authority to regulate all bridges ("railroad or other") and to require the alteration or removal of those which obstruct navigable waters.

The sixth section makes it a misdemeanor to deposit any material in any harbor or river to the obstruction of navigation. At the same time the Secretary of War is given authority to permit such deposits in places where navigation will not be obstructed.

Section 7 makes it a misdemeanor to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside harbor lines or in

any navigable waters where no harbor lines are established, without the permission of the Secretary of War, in such manner as shall obstruct navigation. It makes it unlawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port or navigable waters of the United States, under State authority, until the location and plan of the bridge or other works shall be submitted to and approved by the Secretary of War, or to excavate, fill, or alter the channel of any navigable waters of the United States until approved or authorized by the Secretary of War.

Section 8 provides that all wrecks and other obstructions which have been allowed to remain in navigable waters for a longer period than two months may be broken up and removed by the Secretary of War.

The ninth section makes it unlawful for any person to build upon, obstruct, or injure in any way any sea wall, bulkhead, jetty, pile, levee, wharf, pier, or other works built by the United States.

These sections would seem to cover the ground and regulate all possible obstructions to navigable waters. The alteration or removal of offending bridges of any kind (sections 4 and 5); the unlawful deposit of material calculated to obstruct navigation (section 6); the building of any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside harbor lines, or where there are no harbor lines (section 7); the building of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any navigable waters (section 7); the removal

of wrecks and similar obstructions (section 8); the injury or unlawful use of jetties, piles, wharves, or other improvements made by the United States (section 9); but Congress was not content even to leave the matter thus. It enacted section 10 which provides:

> That the creation of any obstruction not affirmatively authorized by law to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited.

This is a provision which looks to the future. It prohibits *the creation* of any obstruction. This means, of course, creation after the passage of the act. By the preceding sections Congress provided for the alteration or removal of offending bridges by the Secretary of War. It made it an offense to build "any wharf, pier, dolphin, dam, weir, breakwater, bulkhead, jetty, *or structure of any kind*," without the permission of the Secretary of War. It made it a misdemeanor to commence the construction "of any bridge, bridge draw, bridge piers and abutments, causeway, *or other works*," although authorized by an act of the legislative assembly of a State, until the location and plan of such works should be submitted to and approved by the Secretary of War.

Is it possible that Congress, after making these stringent prohibitions, intended by the opening sentence of section ten to authorize any obstruction to the navigable capacity of any waters in respect of which the United States has jurisdiction which any State may see fit to permit? To state this question is to answer it. I submit that Congress intended by this comprehensive provision to prohibit the creation of *any* obstruction to the

waters not affirmatively authorized by the law of the Government which assumed jurisdiction to prohibit the obstruction—that is, the law of the United States. The preceding sections authorize the creation of certain obstructions in a lawful way. After providing how authority might be obtained to create such obstructions, Congress inserted this provision which applies to all obstructions. Section seven expressly provides that no boom can be built in any navigable waters without permission of the Secretary of War, yet the courts below and opposing counsel insist that under section ten a boom may be built in navigable waters by permission of a State!

It is not to be assumed that Congress in using the words "affirmatively authorized by law" meant "affirmatively authorized by law of the United States or of any State." On the contrary, the presumption is that Congress had in mind its own law. By this act Congress assumed control of a subject over which its jurisdiction when once exercised was supreme. When Congress legislates upon a subject over which its jurisdiction is paramount, and it intends to place limitations upon its authority, it uses affirmative expressions—words about which there can be no mistake. It has done this in section seven where it uses the phrase "under any act of the legislative assembly of any State." To construe the words "affirmatively authorized by law" to apply to State legislation is to say that Congress intended to prohibit all obstructions to the navigable capacity of waters in respect of which the United States has jurisdiction, except such obstructions as the States might see fit to

authorize. By this construction Congress assumed jurisdiction over the waters of the United States and at the same time abdicated control in favor of the States.

Section 10 proceeds:

> The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense.

I submit that the words "such obstruction" refer to the obstruction the creation of which is prohibited; that is, an obstruction which is not affirmatively authorized by the law of the United States, which is not recognized as lawful by the United States. Congress intended to assume full jurisdiction and require the removal of all obstructions which it did not see fit to recognize as lawful. It makes an exception in favor of bridges, because the act contains in sections four and five provisions for the alteration or removal of offending bridges, and of piers, docks, and wharves, and similar structures erected for business purposes, because such structures are really appurtenant to the shore and are built in aid of navigation.

The case of *United States* v. *Burns* (54 F. R., 351), was cited by opposing counsel in the lower courts in support of their contention that the words "affirmatively authorized by law" refer to action by the States through their legislatures as well as to action by the United States through Congress. This case was decided by the circuit court for the district of West Virginia (Judges Goff and Jackson). Judge Goff delivered the opinion. The court passed upon the validity of an indictment,

containing six counts, charging the defendants with violating the provision of sections 6, 7, and 10 of the act of September 19, 1890, by obstructing the navigation of the Little Kanawha River in various ways. The court very properly quashed the indictment because of the manner in which the offenses were charged. In doing this, the court had occasion to express its view of what Congress prohibited by the tenth section, which is involved in the case at bar, page 362.

> What is it that the Congress has prohibited by the tenth section? All obstructions to the navigable capacity of the river are not prohibited, but only those "not affirmatively authorized by law." This legislation, in effect concedes that which is well known to be true, that the necessities of commerce, the interests of the country, demand that certain obstructions to the navigable capacity of our rivers must be authorized, and their creation permitted. Under certain circumstances, bridges, piers, docks, dams, and booms, the object of which is to facilitate trade and commerce, become in many instances serious obstructions to the navigable capacity of our waters, and yet they are "affirmatively authorized by law." In the seventh section of the act under consideration, *Congress has authorized the building of many structures that may obstruct or impair the navigable waters of the United States, provided the permission of the Secretary of War has been first obtained.* By that section it is made unlawful to hereafter build in the navigable waters of the United States, any structure of any kind in such manner as will obstruct or impair navigation, *without the permission of the Secretary of War. The evident intention of Congress was to take exclusive charge of such matters*

in the future for the United States, and to place them under the charge of the Secretary of War, leaving it to his discretion to authorize or prohibit the building of the structure and the creation of the impairment of navigation; thus rendering it unnecessary to apply to Congress for permission, or special legislation in particular cases, as had frequently been done theretofore. At the time of the passage of this act authority to build structures of the character mentioned in it had been given by the States as well as by the United States, and *Congress did not intend to prevent their construction absolutely, but prohibited those only authorized by the legislative assembly of the States until the location and plan of the structure had been submitted to and approved by the Secretary of War*. It was thus possible, even after the passage of the act, to construct certain structures in a manner prohibited by the act, provided it had been authorized by law previous to such enactment.

The portions of this extract which I have placed in italics are sufficient, I think, to show that the court took the view that the words "affirmatively authorized by law" refer to Congressional action, and not to State. Judge Goff says: "The evident intention of Congress was to take exclusive charge of such matters in the future for the United States."

In *Lake Shore and Michigan Railway* v. *Ohio* (165 U. S., 365), it was held that sections 4, 5, and 7 of the act of September 19, 1890, do not deprive the States of authority to regulate bridges over navigable waterways within their limits, but simply create an additional remedy for preventing the obstruction of navigable streams by such structures. The case was a suit in quo warranto,

brought by the State of Ohio to oust the railway company from the franchise of maintaining a bridge over the Ashtabula River which obstructed the navigation of that stream. The Ohio courts ordered the railway company to alter the bridge or remove it. The case was carried to this court upon the contention that the act of September 19, 1890, conferred upon the Secretary of War exclusive authority to regulate such bridges, and that therefore the State of Ohio had no power to do what it had done in the case. The contention was overruled and the judgment of the supreme court of Ohio affirmed. The court was clearly right. Section 7 expressly recognizes the power of a State legislature to authorize the erection of a bridge, subject, of course, to the approval of the Secretary of War.

V.

Conceding, for the sake of the argument, that the words, "affirmatively authorized by law," refer to State action, I submit that the boom was not authorized by the law of the State of Washington, because it was not built in compliance with that law, but in violation of it. The act of Washington provides:

> That such boom or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels, or steam crafts of any kind whatsoever, or for ordinary purposes of navigation.

This boom leaves no free passage for steamboats between it and the opposite shore. It crosses the channel.

It blocks the river at its mouth. I refer the court to the maps in the record. This is a navigable river. The authority of the United States over it is supreme. Congress has assumed control, and, authorized by it, the Government has called upon the boom company to show its authority for obstructing the river and impeding navigation. The company produces the law of Washington. The Government says: "That law authorizes a boom, but not the one you have built. The boom it authorizes is one constructed so as to allow the free passage of steamboats between it and the opposite shore. Yours is not so constructed. It crosses the channel. It prevents the passage of steamboats. It is not authorized by law."

To this the boom company retorts: "There is the law. Whether our boom conforms to it is a State question. It is none of your concern."

The boom company is right in one sense. We can not call it to account for a breach of the law of Washington, but we can call it to account for obstructing this river, and if it sets up State authority, we can insist it show that it pursued that authority, complied with its conditions, and conformed to its requirements.

If a State law permits the building of a wharf inside established harbor lines, the law can hardly serve as authority for building a wharf outside such lines. So, if the State law allows the building of a boom part way across a river, so as to leave a free passage for steamboats between it and the opposite shore, it gives no authority to build the boom clear across the river, so as completely to obstruct navigation.

Another consideration. In applying the words "affirmatively authorized by law," effect must be given to the word "affirmatively." Congress used this word for a purpose. It meant that neither by implication nor by acquiescence could an obstruction to navigable waters be legalized. The Boom Company relies on State authority. It must therefore show that the State "affirmatively authorized" its boom. That the State has stood by and acquiesced in the erection and maintenance of a boom, which its law did not and does not affirmatively authorize, is not sufficient.

I submit that the judgments of the lower courts should be reversed and the case remanded, with instructions to enter a decree for the United States.

JOHN K. RICHARDS,
Solicitor-General.

FEBRUARY 7, 1899.

APPENDIX.

RIVER AND HARBOR ACT OF SEPTEMBER 19, 1890.

(26 Stats., 453, 454.)

SEC. 4. That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw-opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of war shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken.

SEC. 5. That section ten of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises such persons, corporation or association shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed.

SEC. 6. That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind whatever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadstead, harbor, haven, navigable river, or navigable waters of the United States which shall tend to impede or obstruct navigation, or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or

may be impeded or obstructed: *Provided*, That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft any stones, rocks, bricks, lime, or other materials used, or to be used, in or toward the building, repairing, or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, haven, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable and for the best interests of such improvements, or to prevent the depositing of any substance above mentioned under a permit from the Secretary of War, which he is hereby authorized to grant, in any place designated by him where navigation will not be obstructed thereby.

SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted

to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such State.

SEC. 8. That all wrecks of vessels and other obstructions to the navigation of any port, roadstead, harbor, or navigable river, or other navigable waters of the United States, which may have been permitted by the owners thereof or the parties by whom they were caused to remain to the injury of commerce and navigation for a longer period than two months, shall be subject to be broken up and removed by the Secretary of War, without liability for any damage to the owners of the same.

SEC. 9. That it shall not be lawful for any person or persons to take possession of or make use for any exclusive purpose, or build upon, alter, deface, destroy, injure, obstruct, or in any other manner impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works.

SEC. 10. That the creation of any obstruction not affirmatively authorized by law to the navigable capacity

of any waters in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharfs, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creation or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

UNITED STATES v. BELLINGHAM BAY BOOM COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 21. Submitted December 15, 1899. — Decided January 29, 1900.

The power of Congress to pass laws for the navigation of public rivers, and to prevent any and all obstructions therein, cannot be questioned.

When the Attorney General acts under the authority conferred by the river and harbor act of September 19, 1890, c. 907, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by statute, and the court has jurisdiction, and it is its duty to decide whether the existing obstruction is or is not affirmatively authorized by law.

In such inquiry the court is bound to decide whether the boom, as existing, is authorized by any law of the State, when such law is claimed to be a justification for its creation or continuance.

There is no doubt that the boom in question in this case violates the statute under which it was built, because it does not allow free passage between the boom and the opposite shore for boats or vessels as provided for in the state law.

THE case is stated in the opinion.

Mr. Solicitor General for the United States.

No appearance for the Bellingham Bay Boom Company.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This suit was commenced in the Circuit Court of the United States for the State of Washington, Northern Division. The Government brought it under the direction of the Attorney General, to obtain an injunction enjoining the defendant from further continuing a certain boom which it had constructed across the Nooksack River in that State, and to obtain the removal of the same as an obstruction to the navigation of that river.

The defendant is a corporation organized under the laws of the State of Washington, and in its answer it denied that the boom was an obstruction to the navigation of the river, and

alleged that it was duly authorized to construct and maintain it by virtue of an act of the legislature of the State, and that it had completed the structure prior to the enactment of the Federal river and harbor bill on the 19th of September, in the year 1890.

The authority under which this suit was commenced is the river and harbor act of 1890, approved September 19 of that year, 26 Stat. 426, 454, c. 907, the tenth section of which reads as follows:

"SEC. 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offence, and each week's continuance of any such obstruction shall be deemed a separate offence. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

On the trial it appeared that the Nooksack River is a navigable stream having its source in Whatcom County, State of Washington, and runs through Whatcom County to Bellingham Bay, emptying into that bay, and thence into the Pacific Ocean. The waters of the river lie wholly within Whatcom County, and they are navigable from its mouth for a distance

of several miles towards its source by light water craft. The boom in question, built by the defendant company at a point just above where the river empties into the bay, is frequently an obstruction to the navigation of the river by steamboats and other craft, as the boom crosses the channel of the river and entirely fills it, excepting that there is what is termed a "trip," which may be opened and vessels pass through the same on their way up and down the river. This "trip" is, however, frequently so choked and blocked up by logs and drift wood coming down the river as to render it impossible to open it.

The defendant during the continuance of the boom has from time to time expended moneys for the improvement of the navigation of the river by removing brush, trees and drift from the mouth thereof, and it has removed trees, snags and drift from the channel for a distance of from fifteen to twenty miles from the mouth of the river. Navigation for boats and water craft has thereby been considerably facilitated, but at the same time the obstruction to the navigation of the river by reason of the existence of the boom is material and at times total. The river is used for navigation by steamboats and small craft for a distance of some miles from its mouth. One of the chief purposes for which the river is used is as an outlet for floating saw logs and timber products to the mills and to market.

The Circuit Court was of opinion that as the chief value of the Nooksack River as a highway is for the floating of saw logs, that persons and corporations having to use it for that purpose have rights equal to the rights of others to use the river for a highway for boats and vessels, and that a boom at the mouth of the river being necessary for gathering and holding logs is to be regarded as an aid to the use of the river for a lawful purpose and entitled to protection, the same as a wharf or pier constructed at a place for the convenience of vessels; that the boom was constructed under the authority of the state legislature, and it was for that reason excepted from the provisions of the tenth section of the act of Congress. The court therefore dismissed the bill. 72 Fed. Rep. 585.

The Government appealed to the Circuit Court of Appeals for the Ninth Circuit, and that court held that as at the time of the building of the boom there was no act of Congress on the subject, and a state statute authorized the building, it was affirmatively authorized by law within the meaning of the tenth section of the act of Congress. It also held that whether or not the boom was constructed in strict accordance with the terms and provisions of the state statute could not be considered, as that was a question to be determined by the state and not by the Federal court. On these grounds it affirmed the judgment. 48 U. S. App. 443.

It is evident that the first sentence of the tenth section of the Federal act refers to an obstruction created after the passage of the act. The obstruction prohibited is one that is "not affirmatively authorized by law," and the section then provides that "the continuance of any such obstruction, . . . whether heretofore or hereafter created, shall constitute an offence," and authority is given to the Attorney General to cause a suit of this character to be commenced.

At the time when the boom was constructed, Congress had not by any legislation asserted its authority over nor taken into its own jurisdiction the subject of obstructions to the navigation of this river. The appropriations made by Congress in different years since 1884, for improvements in the Nooksack, among other rivers in the Territory of Washington, did not constitute such an assumption of jurisdiction over the navigation of the Nooksack River as to prevent the State from legislating upon the subject. *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S. 1. As Congress had not assumed such jurisdiction either at the time of the passage of the act by the legislature of Washington permitting the construction of a boom by the defendant, nor at the time of its actual construction, then, if it were constructed in a manner conformable to the state statute, it was affirmatively authorized by law at the time of the passage of the act of Congress. It is contended by the Government that this term refers to a law of Congress and does not include any law of a state legislature. We do not so construe section 10.

Congress, it must be assumed, was aware of the fact that until it acted upon the subject of navigable streams, which were entirely within the confines of a single State, although connecting with waters beyond its boundaries, such State had plenary power over the subject of that navigation, and it knew that when in the absence of any statute of Congress on the subject, an obstruction to such a navigable river had been built under the authority of an act of the legislature of the State, such obstruction was legal and affirmatively authorized by law, because it was so authorized by the law of a State at a time when Congress had passed no act upon the subject. When Congress, in 1890, passed the river and harbor bill we think the expression contained in section ten in regard to obstructions "not affirmatively authorized by law," meant not only a law of Congress, but a law of the State in which the river was situated, which had been passed before Congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances, we cannot doubt, was an obstruction "affirmatively authorized by law." When, therefore, the section continues, and provides that "any such obstruction, . . . whether heretofore or hereafter created," shall constitute an offence, it referred to an obstruction as described in the first sentence of the section, namely, an "obstruction not affirmatively authorized by law." If the obstruction were affirmatively authorized by a law of the State, it did not come within the condemnation of the section, and its continuance was, therefore, valid.

The power of Congress to pass laws for the regulation of the navigation of public rivers and to prevent any and all obstructions therein cannot be questioned. When Congress chooses to act, it is not concluded by anything that the States, or that individuals by their authority or acquiescence have done, from assuming entire control of the matter, and abating any obstructions that may have been made and preventing any others from being made except in conformity with such regulations as it may impose. The ultimate power of Congress over the whole subject is undoubted. This has been

decided in numerous cases, and in the case of *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, many of them are referred to by Mr. Justice Bradley in delivering the opinion of the court. If, however, in exercising its right in regard to the regulation and control of commerce, private property must be taken, the Government is obliged to make compensation to the owner. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 336. Whether ordering the removal of the obstruction, unaccompanied by the actual taking of the property, would under other circumstances affect the question of compensation, it is not necessary to here decide, as for the reason hereafter given, the boom was an unauthorized obstruction and subject to abatement as such under the act of Congress.

As this defendant claims that the obstruction in the river was affirmatively authorized by an act of the state legislature, we must look at that act for the purpose of determining the validity of the claim. The act under which the boom was created is entitled "An act to declare and regulate the powers, rights and duties of corporations organized to build booms and to catch logs and timber products therein." The third section provides: "Such corporations shall have the power and are hereby authorized, in any of the waters of this State, or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporations: *Provided*, That such boom or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation." 1 Hill Ann. Stat. Washington, § 1592.

The reading of this section shows that the boom authorized to be constructed was one which should allow the free passage between the boom and the opposite shore of boats, vessels, etc. The evidence shows that this boom was not so constructed, because it crossed the channel of the river, completely blocking it, and left no space for the free passage of

boats and vessels between the end of the boom and the opposite shore. The building of the so-called "trip" was no compliance with the act. By the passage of the river and harbor bill, containing the above mentioned tenth section, Congress has acted upon the subject, and has provided for the removal of any obstruction to a navigable river with the exceptions named in the section. When the Attorney General, therefore, acts under the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction and it is its duty to decide the question whether the existing obstruction is or is not affirmatively authorized by law. In such inquiry the court is bound to decide whether the boom as existing is authorized by any law of the State, when such law is claimed to be a justification for its creation or continuance. That question is not for the State alone, but must necessarily be decided by the Federal court in the course of exercising the jurisdiction conferred upon it by the Federal statute. We, therefore, cannot concur with the views of the Circuit Court of Appeals on this subject.

The authority cited by that court for its position was the *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S. 1. In that case, however, there had been no act of Congress upon the subject of the navigation of the Willamette River, and without such statute it was held that the United States could not bring within the scope of its laws, obstructions and nuisances in navigable streams within a State, such obstructions and nuisances being offences against the laws of the State within which the navigable waters lie, and constitute no offence against the United States, in the absence of a statute. The court used the following language:

"There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offences against the laws of the States within which the navigable waters lie, and may be indicted or pro-

hibited as such; but they are not offences against the United States laws which do not exist; and none such exist except what are to be found on the statute book. . . . The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a Federal one. The failure of the state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence."

If there were here no Federal law in existence, then the question whether the boom was authorized by a state law or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law, the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. If it is authorized by the state law, then the Federal law provides that it may continue; and whether it is or is not, becomes a question for the Federal court to decide.

There is no doubt that the boom in question in this case violates the statute under which it was built, because it does not allow free passage between the boom and the opposite shore for boats or vessels as provided for in the state law. For this reason the Government was entitled to a decision in its favor, and

We therefore reverse the decrees of the Circuit Court of Appeals for the Ninth Circuit and of the Circuit Court of the United States for the District of Washington, Northern Division, and remand the case to the Circuit Court for further proceedings in accordance with this opinion.